Supreme Court, U.S.
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No. 95-89

In The

Supreme Court of the United States

October Term, 1995

LORRAINE BILLS,
Petitioner,

v.

SGT. DENNIS W. ASELTINE, OFFICER BRIAN P. DENOYER, OFFICER RICK DAVIS, OFFICER JEFFREY K. EWALD, OFFICER DEBRA GAWRON, OFFICER MEDBURY, and CHIEF LARRY OWEN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND APPENDIX

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QUESTIONS PRESENTED

The permissible constitutional role of a private citizen in the execution of a search warrant has not been fully considered by this Court. In this case, a police officer obtained a valid search warrant against the son of the homeowners to look for a stolen portable generator. In the course of executing the search warrant, the officer invited and assisted a security officer from the parent's employer, General Motors, to accompany him through the dwelling place so that he could conduct his own search for allegedly stolen auto parts. The question presented is whether the Fourth Amendment protects citizens against searches by private persons who are acting at the invitation and with the assistance of police officers. The 6th Circuit below has held that the unreasonablesness of such a search must be determined by a jury. The 2nd Circuit has held such a search violates clearly established Fourth amendment standards and is a per se violation of the homeowner's constitutional rights.

Two Circuit Courts have arrived at different conclusions of such private citizen participation when the private citizen's activity have not been in furtherance of the original, valid search warrant. It is important that the public and law enforcement officials clearly understand the constitutional limitations that restrict police officers acting in concert with private citizens.

PARTIES*

Lorraine I. Bills, Petitioner
Sgt. Dennis Aseltine, Respondent
Officer Brian P. DeNoyer, Respondent
Officer Jeffrey K. Ewald, Respondent
Officer Rick Davis, Respondent
Chief Larry Owen, Respondent
Officer Debra Gawron, Respondent

THERE IS NO PARENT OR SUBSIDIARY COMPANY TO BE LISTED UNDER RULE 29.1.

*** General Motors Corporation was denoted as a party in the caption of the case in the trial court, but was dismissed.**

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The Sixth Circuit has issued two opinions in this matter. The most recent (*Bills II*) was on April 26, 1995 and is reported at 52 F.3d 596 (6th Cir. 1995). Previously, *Bills I* was issued on March 9, 1992 and is reported at 958 F.2d 697 (6th Cir. 1992). Both are reprinted in the Appendix hereto at A-1 and A-23, *infra*.

STATEMENT OF JURISDICTION

Suit was brought on August 28, 1989 in the United States District Court for the Eastern District of Michigan, Southern Division under 42 U.S.C 1983. The trial court ordered a dismissal of the Amended Complaint on February 7, 1991 for all the defendants on grounds of qualified immunity. This decision was reversed in part by the Sixth Circuit on March 9, 1992.

Upon remand to the trial court, it granted summary judgment to all of the defendants except Aseltine on grounds of qualified immunity on September 29, 1992. A jury rendered a verdict for Aseltine on November 5, 1993 and judgment was entered accordingly. The Sixth Circuit affirmed the trial court on April 26, 1995.

Petitioner invokes this Court's jurisdiction to review the judgment of the Sixth Circuit under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. CONSTITUTION, AMENDMENT IV.
Searches and Seizures:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

42 U.S.C. 1983. Civil action for deprivation of rights:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

Plaintiff Lorraine Bills, her husband Dennis Bills, and her two sons, Charles and Howard Sutton, resided at 5401 West M-36, Pinckney, Michigan. Both were employed at the General Motors Proving Grounds as test drivers. On August 20, 1987, Sergeant Dennis Aseltine of the Pinckney Police Department learned that petitioner's son, Charles Sutton, had stolen a Kubota brand portable generator and that it was stored at the Bills' home. Aseltine obtained a warrant that authorized a search of the Bills' home, garage, and adjoining shed.

Prior to executing the warrant, Aseltine telephoned William Meisling, a security officer at the General Motors Proving Grounds, to invite him to accompany police during the execution of the warrant. Neither Meisling nor General Motors were in any way connected to the Kubota generator or Charles Sutton. Aseltine also obtained the assistance of the other respondents from surrounding police agencies to assist with the execution of the search.

Charles Sutton answered the door of the Bills' home (Petitioner and her husband were at work) and was served with the warrant. Sutton immediately led Aseltine to the Kubota generator in the shed. The other officers entered the home and conducted what has been characterized as a "protective sweep". Upon locating the Kubota generator, the officers spotted a Yamaha brand generator nearby and a telephone check of police records revealed that it also had been stolen. An officer was dispatched to procure a warrant for its seizure.

Meisling arrived shortly after the Kubota generator had been found and seized. Aseltine then accompanied him on a two hour tour of the Bills' house during which Meisling took 231 photographs of items he saw. Both Aseltine and Meisling admit that Meisling was not invited to assist in the search and seizure of the Kubota

generator and in fact did not participate in that search in any way. He was there solely to search for General Motors parts and tools he suspected were being stolen from the Proving Grounds. Neither before, during nor after their search, did Meisling or Aseltine believe they had sufficient information upon which to base probable cause. Only after Meisling returned to General Motors and conferred with other officials did he feel he was able to seek a warrant of his own, which he did the next morning.

On August 21, 1987, a search warrant was issued and Meisling accompanied by Michigan State Trooper Darnell Seering, two local officers and other GM personnel searched the Bills' residence and seized a variety of auto parts and equipment. GM then fired Petitioner and her husband. Mr. Bills was charged with receiving and concealing stolen property, but the Livingston County Circuit Court dismissed the charges after suppressing all of the evidence seized on August 21, 1987 as being tainted by the overly broad search of the day before in violation of the Michigan Constitution.

Lorraine Bills sued General Motors and all the local police officers involved in the searches, their respective municipalities, State Trooper Seering, and the State of Michigan under 42 U.S.C. 1983, 1985 and 1988 in the United States District Court for the Eastern District of Michigan, Southern Division. She alleged deprivation of her rights under the Fourth Amendment to the United States Constitution. She also claimed violation to her rights under the Michigan Constitution and state law causes of action for trespass and negligent or intentional infliction of emotional distress. General Motors was voluntarily dismissed. The district court ordered dismissal for the rest of the defendants on all of the Bills' claims on February 7, 1991.

On March 9, 1992, The Sixth Circuit Court of Appeals reversed, in part, the trial court's decision at 658 F.2d 697 (6th Cir. 1992). (*Bills I*, App. *infra*, A-23–A-24). The

Court reversed the district court's finding of qualified immunity because "genuine issues of material fact exist concerning the reasonableness of the conduct of the police in inviting a private citizen to the dwelling of another for purposes unrelated to the execution of the search warrant." (*Bills I*, App. *infra*, A-43). The Court also remanded the pendant constitutional claims because they had been dismissed based on the absence of an underlying federal constitutional violation. The dismissal of Seering, the State of Michigan and the local municipalities was affirmed.

Upon remand, on September 29, 1992, the district court again dismissed all Bills' claims against all the remaining officers except Aseltine because the court found they were entitled to qualified immunity. A full jury trial on the merits of the claims against Aseltine was conducted and the jury was provided a verdict form with the interrogatory: "Was it unreasonable under the circumstances for the defendant to invite William Meisling to enter plaintiff's home on August 20, 1987?" The jury answered in favor of the defendant and judgment was entered.

On a second appeal, The Sixth Circuit affirmed the trial court's actions on April 26, 1995. 23 F.3d 595 (6th Cir. 1995). (*Bills II*, App. *infra*, A-1–A-22). Though the Court held that the trial court erred in dismissing the other defendants on the basis of qualified immunity, it held that the jury finding in favor of Aseltine acted as a collateral estoppel for further proceedings against them. As to Aseltine, the Court held that the full parameters of the role of private citizens in executing search warrants has not been completely or clearly defined. Therefore, the Court held that the reasonableness of Aseltine's invitation and assistance of Meisling's private search must go to the jury as it did.

It is from this opinion that Petitioner seeks review by this Court.

REASONS FOR GRANTING THE WRIT

THE SECOND AND SIXTH CIRCUIT COURTS HAVE REACHED DIFFERING CONCLUSIONS AS TO WHETHER THE PARTICIPATION OF A PRIVATE CITIZEN AT THE EXECUTION OF A SEARCH WARRANT, FOR REASONS UNRELATED TO THAT SEARCH WARRANT, IS A VIOLATION OF FOURTH AMENDMENT RIGHTS. THE SECOND CIRCUIT'S RULING IS CORRECT AND THE SIXTH CIRCUIT'S IS ERRONEOUS.

The major question for the Court's consideration is whether a police officer, in the course of executing a search warrant, may invite and assist a private person to simultaneously come on to the premises and conduct his own search which has no relationship to the warrant. Clearly, where the additional intruder is another police agency conducting a separate warrantless search, such a search has long been held to violate the Fourth Amendment as a matter of law. *Byars* v. *United States*, 273 U.S. 28 (1927); *United States* v. *Sanchez*, 509 F.2d 886 (1975). Where, however, the intruder is a private citizen and not a law enforcement officer or governmental official, the Sixth Circuit has held that such conduct is not a *per se* violation of Fourth Amendment, but rather the reasonableness of the invitation and search is a factual question to be decided by the jury.

To the contrary, the Second Circuit has held such an intrusion is not authorized expressly or implicitly by the search warrant and is, as a matter of clearly established constitutional law, a violation of Fourth Amendment rights. *Ayeni* v. *Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. den.*, 63 U.S.L.W. 3564 (April 17, 1995). In that case, Secret Service agents, investigating credit card fraud, obtained a warrant to search Ayeni's apartment for evidence. The agents invited a television crew from CBS to videotape the search by the agents. They followed the agents during the search of the Ayeni's home for twenty minutes filming the personal effects of the residents. There was no claim that the presence of the CBS crew served any legitimate law enforcement purpose.

In rejecting Mottola's claim of qualified immunity to a 42 U.S.C. 1983 claim, the Court held that the agents exceeded well-established principles when they brought into the Ayeni home persons who were neither authorized by the warrant to be there nor serving any legitimate law enforcement purpose by being there. The Court held that

> "... court decisions have repeatedly made clear that law enforcement officers conducting searches under a warrant are limited in their conduct to either (a) actions expressly authorized by the warrant or (b) such further actions as are impliedly authorized because they are reasonably related to accomplishing the search authorized by the warrant or accomplishing additional legitimate law enforcement objectives such as insuring the safety of the searching officers and effectively responding as law enforcement officers to circumstances that might arise during the course of the search."
>
> *Ayeni*, p 685.

The Court went on to say that a search warrant identifies not only the premises to be searched and the items that may be examined or seized, but also the officers who are authorized to participate in the search and seizure. Since neither the affidavit submitted with the warrant application nor the warrant itself requests or permits the presence of private parties, the Court found no express authorization for CBS' presence. Such authorization was found to be indispensable especially when a search involved a private home:

> "While incursions into private homes are permitted under certain limited circumstances in order to protect the public's interest in controlling crime, determinations regarding the necessity, location, scope and conditions of such incursions are generally to be made by disinter-

> ested judicial officers and not by the officers conducting the search."
>
> *Ayeni,* p 685.

The unreasonableness of the conduct was heightened, the Court felt, because it was "calculated to inflict injury on the very value that the Fourth Amendment seeks to protect — the right to privacy" (*Ayeni*, p 686). The obvious purpose of bringing in the camera crew-to permit public broadcast of their private premises — wholly lacked any justification. Thus, the impairment of the Ayeni's right to privacy was needlessly magnified.

Finally, the Second Circuit found that "an objectively reasonable officer could not have concluded that inviting a television crew — or any third party not providing assistance to law enforcement — to participate in a search was in accordance with Fourth Amendment requirements" (*Ayeni*, p 686). The very act in question need not have been previously held unlawful, but the unlawfulness of the act was apparent. The contours of the Ayeni's rights were sufficiently clear that a reasonable official would understand those rights were being violated. Citing *Anderson* v. *Creighton*, 483 U.S. 635, 640 (1987).

The 6th Circuit below held that the presence of a private citizen at the execution of a search warrant is not a *per se* constitutional violation. (*Bills II,* App., *infra,* A-10). It distinguished the "presence" of the private citizen from the "invitation" to the third party to be present. As to mere presence, the Court found that "the full parameters of the role of private citizens in executing search warrants has not been completely, or clearly defined." (*Bills II,* App. *infra,* A-11). Thus in both *Bills I* and *Bills II*, the Court made it clear that it did not think Meisling's mere presence would justify a finding of liability. (*Bills II*, App. *infra,* A-17; *Bills I*, App. *infra*, A-33). It distinguished *Ayeni* by finding that the 2nd Circuit failed "to define narrowly the right allegedly vio-

lated, instead describing the violation in abstract and general terms." (*Bills II*, App. *infra*, A-9). *Bills II* reaffirmed the holding in *Bills I* where the Court flatly held that; "Meisling's inspection tour and photographing of items in the plaintiff's home, by itself; while perhaps constituting a trespass, does not offend the constitution." (*Bills II*, App. *infra*, A-17). Though upholding the trial court's dismissal of claims against the other respondent officers on grounds of collateral estoppel, the Court held that the district court should have considered various facts that suggest the officers should have realized that the third party's presence was illegal. (*Bills II*, App. *infra*, A-13).

As to Aseltine's invitation to Meisling, the court below held in both of its opinions that the reasonableness of the police inviting a private citizen into the dwelling of another for purposes unrelated to the execution of a search warrant is a question for the jury:

> "... Thus the principal question in this case is whether the officers exceeded the scope of their authority under the warrant in inviting Meisling to conduct an inspection of a private dwelling they controlled ...
>
> * * *
>
> ... Whether this breached the trust under which they held the premises in their complete command, or whether, stated another way, this unreasonably exceeded the scope of the warrant, is a question for the jury in this case."
>
> *Bills II*, App. *infra*, A-18–A-19 quoting *Bills I*, App. *infra*, A-35–A-36.

Nowhere in either opinion did the Sixth Circuit ever set forth any standards by which "reasonableness" should be measured. At trial, there was little dispute as to what objectively happened at the Bills' home on August 20, 1987. Rather, the jury was left to make an

essentially subjective determination of the reasonableness of Aseltine's conduct based on their ordinary experience, absent any Fourth Amendment frame of reference. At Aseltine's trial, the District Court even refused to allow the jury to hear or view the wording of the Fourth Amendment itself or to hear the State Court's ruling that had suppressed the evidence gathered in the search at the attempted prosecution of Mr. Bills. Instead, over plaintiff's vigorous objections, and the trial court's minimal instruction, the jury was asked to render a verdict in the form of answers to a series of interrogatories, the first of which was:

> "Was it unreasonable under all of the circumstances for defendant to invite William Meisling to enter plaintiff's home on August 20, 1987?"

Petitioner contends that the Court below made several errors in analyzing the applicable law. First of all, it erred in finding that Meisling was simply a private citizen and not an agent or conspirator of the police. Secondly, since Meisling's search was held to be a separate and distinct search, a separate warrant should have been required. And lastly, there being no express authority in the Kubota generator warrant against Charles Sutton to search for General Motors parts that his parents were suspected of stealing from General Motors, there is no principle of Fourth Amendment law that implicitly authorized Meisling's search.

Meisling Was Aseltine's Agent Or Conspirator.

As a General Motors security officer, William Meisling was a private citizen and thus not subject to the restraints of the Fourth Amendment in that capacity. *Burdeau* v. *McDowell*, 256 U.S. 475 (1921). Even where the private citizen's action is an illegal trespass, such conduct alone does not violate the Fourth Amendment. Nevertheless, the evidence was undisputed that Meisling entered the Bills' home at the invitation of Sergeant Aseltine, was driven to the residence by Officer Gawron,

and was accompanied on his two hour photographic tour of the premises by Aseltine while the other respondents held the premises pursuant to the authority of the search warrant for the Kubota generator which had been found and seized before Meisling ever arrived at the house. The Court below held in *Bills I* that Meisling's presence as a private citizen was not authorized by any legal process or any known legal doctrine and was in fact illegal. (*Bills I*, App. *infra*, A-32). But the Court ignored the fact that Meisling's trespass was made possible only by the invitation and acquiescence of the police officers. It was Aseltine's idea. Meisling never would have dreamed of invading the Bills' home without the help and acquiescence of the police. In spite of those undisputed facts, in *Bills II*, the Court held that ". . . Meisling was not a state actor and thus cannot violate the Fourth Amendment". (*Bills II*, App. *infra*, A-19).

This Court has held that the actions of private citizens, when acquiesced to and supported by police activity, are subject to Fourth Amendment protection. *Soldal* v. *Cook County*, 450 U.S. 506; 121 L.Ed.2d 450 (1992). *Fuentes* v. *Shevin*, 407 U.S. 67 (1972). The test is whether, in light of all the circumstances of the case, the private citizen acted as an "instrument" or agent of the state. *Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989); *Coolidge* v. *New Hampshire* 403 U.S. 443, 487 (1971). In *Soldal*, the sheriffs merely protected the private citizen from interference by the homeowner in an illegal eviction. In *Fuentes*, state power was invoked to replevin goods. Here, the police actively solicited Meisling's participation and assisted him every step of the way. There can be no doubt that he was acting on behalf and in concert with the police to conduct his search. Meisling was clearly an instrument of the police and his actions must be attributable to them.

As A Separate And Distinct Search, Meisling's Search Required Separate Probable Cause And A Separate Warrant.

Bills I held that Meisling's intrusion was separate and distinct from the police entry because he entered the premises for purposes other than the execution of the search warrant. (*Bills I*, App. *infra*, A-32). If that is true, and if Meisling was acting as an instrument of the police, a separate warrant was absolutely required by the explicit terms of the Fourth Amendment.

Warrantless searches of citizen's home are most closely scrutinized by the Courts. "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions.'" *Mincey* v. *Arizona*, 437 U.S. 385, 390 (1986), quoting *Katz* v. *United States*, 389 U.S. 347, 357 (1967).

Unreasonable searches and seizures of citizen's homes were such a deeply felt concern of our forefathers that it has been said to have been one of the potent causes of the Revolution. *United States* v. *Rabinowitz*, 339 U.S. 56 (1950) (Justice Frankfurter dissenting at 69). Resistance to general warrants and writs of assistance bred established principles which were enacted in fundamental law in the Fourth Amendment. *Weeks* v. *United States*, 232 U.S. 383 (1914). Judge Cooley in his *Constitutional Limitations*, pp 425, 426, said: "The maxim that 'every man's house is his castle' is made part of our constitutional history in the clauses prohibiting unreasonable searches and seizures, ..." The sanctity of private dwellings has been accorded the most stringent Fourth Amendment protection. *United States* v. *Martinez-Fuerte*, 428 U.S. 559, 561 (1976).

It has long been held that the search of a private dwelling without a warrant is itself unreasonable and abhorrent to our laws. *Agnello* v. *United States*, 269 U.S. 20, 32 (1925). Moreover the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. *Mincey v. Arizona*, *supra*, 393. A dwelling place search, no less than a dwelling place seizure, requires probable cause. *Arizona* v. *Hicks*, 480 U.S. 321, 328 (1987). The requirement that "no Warrants shall issue, but upon probable cause" plays a crucial part in enforcement of the constitutional protection. *Chimel* v. *California*, 395 U.S. 752, 761 (1969). Quoting *MacDonald* v. *United States*, 335 U.S. 451, the *Chimel* court put it as follows at p 761:

> "We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the a home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those who job is the detection of crime and the arrest of criminals . . . ."

Aseltine could not disclose his intentions to a magistrate because he knew he did not have probable cause to obtain a warrant to search the Bills' home for automobile parts that may have been stolen from General Motors. For one thing, neither Aseltine nor Meisling knew of any specific parts that had been stolen from GM or of any specific occasion when such a theft might have taken place. Prior to the search, all Meisling had was an unarticulated suspicion that Mr. and/or Mrs. Bills had been stealing auto parts from the General Motors Proving Grounds where they were both

employed. He had no knowledge of any specific parts that were missing nor did he know of any specific incident where parts had been stolen. He wanted to get inside the Bills' house to explore his suspicions. Aseltine's invitation provided the opportunity.

Just as in *Ayeni*, Meisling's particular presence, as a representative of the Bills' employer, greatly broadened the invasion of privacy. Citizens' expectancy of privacy most surely includes an expectation that their home is a sanctuary safe from intrusion from an employer. Their very livelihood is most often in the hands of the person who pays their wages. The invasion of Bills' privacy was thus magnified, by direct police sponsorship, to expose their most personal items to General Motors Corporation which saw fit to make 231 photographs of what they saw. As it turned out, both Mr. and Mrs. Bills were immediately and peremptorily fired as a result of Meisling's search before any legal action of any kind was taken.

As a separate and distinct search, Meisling's tour of the Bills' premises at Aseltine's invitation required the constitutional protections guaranteed by the warrant process. Even where law enforcement officers have had the necessary probable cause to obtain such a warrant, but for one reason or another have failed to do so, Courts have consistently held such searches illegal. *Byars* v. *United States*, 273 U.S. 28 (1927); *United States* v. *Sanchez*, 509 F.2d 886 (6th Cir. 1975). No exigent circumstances are even alleged that would justify bypassing the warrant process; in fact, the circumstances plainly provided the opportunity to obtain another warrant which Aseltine actually did for the Yamaha generator. No third warrant for the GM parts was possible on August 20, 1987 because no probable cause was established, even after the search was completed.

The Search Warrant For The Kubota Generator Against Charles Sutton Did Not Implicitly Authorize The Search For General Motor's Parts Allegedly stolen By The Bills.

Bills I held that a jury may find that police conduct in inviting Meisling to search the Bills' home for auto parts to have been reasonable in view of the scope of their authority under the original warrant for the generator. Citing *Hill* v. *McIntyre*, 884 F.2d 271, 277 (6th Cir. 1989), the Court held that "questions involving the manner in which a search was executed were questions for the jury in civil actions brought under 42 U.S.C. 1983. (*Bills I*, *infra*, A-35). *Hill*, however, is distinguishable in that conflicting testimony there raised genuine issues of fact as to events leading to the selection of the wrong house for search. Here, there was no dispute as to any events leading to Aseltine's invitation to Meisling or as to his conduct in the Bills' home. Aseltine and Meisling admitted the manner in which Meisling's search was conducted and its pre-planned purpose. All that was left for the jury was the jury was to make the subjective decision as to whether Aseltine's admitted actions were "unreasonable".

The Warrants Clause of the Fourth Amendment explicitly prohibits the issuance of any warrant except one particularly describing the place to be searched and the persons or things to be seized. The manifest purpose of this particularity requirement was to prevent general searches. *Maryland* v. *Garrison*, 480 U.S. 79, 84 (1986). The manner in which a warrant is executed is a separate constitutional issue. *Maryland* v. *Garrsion*, *supra*, p 84. The scope of the search must be strictly tied to and justified by the circumstances which render its initiation permissible and it is imperative that the facts of each case be judged against an objective standard. *Terry* v. *Ohio*, 392 U.S. 1, 19-21 (1967).

Though exceptions to the Fourth Amendment requirements have been carved out to balance the consideration between the citizen's right and law enforcement

needs, none can be applied to the facts of this case. "Protective sweep" searches, to provide for the safety of the police officers, have been carefully limited by this Court. *Maryland* v. *Buie*, 494 U.S. 325 (1989). They are narrowly confined to a cursory visual inspection of those places in which a person might be hiding. Aseltine planned a far more comprehensive search when he invited Meisling. The *Buie* Court set forth the scope and lawful purposes of such searches:

> "We should emphasize that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is nevertheless not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.
>
> * * *
>
> . . . The type of search we authorize today is far removed from the 'top to bottom' search involved in *Chimel;* moreover, it is decidedly not 'automatic' but may be conducted only when justified by a reasonable articulate suspicion that the house is harboring a person posing a danger to those on the arrest scene."
>
> *Maryland* v. *Buie*, 494 U.S. 335-336.

Aseltine and Meisling's two hour tour and the 231 photographs of the Bills' home after the Kubota generator had been seized had absolutely nothing to do with protecting the safety of the officers and was precisely the kind of search the Court did not authorize.

Under the "plain view" doctrine, the incriminating character of items must be immediately apparent to the searching officers. *Horton* v. *California*, 496 U.S.

128 (1990). *Arizona* v. *Hicks*, 480 U.S. 326 (1987). That Aseltine knew in advance he would not be able to recognize the incriminating nature of the items to be observed is amply apparent as the reason he brought Meisling along. Inadvertence is no longer a necessary condition of the plain view doctrine, but immediate recognition of the incriminating nature of items to be seized is always a requirement. Even after Aseltine and Meisling gained entry and looked around, it still wasn't readily apparent to either of them that there was stolen GM property on the premises.

Both *Bills I* and *Bills II* hold that the fact that Meisling was unlawfully on the premises as a trespasser, but found that irrelevant to the Fourth Amendment. (App. *infra*, A-17). This Court has long held that Fourth Amendment deprivations are not "tied to the niceties of local trespass law", but those holdings were clearly expansive rather than restrictive. *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 393-394 (1971). Fourth Amendment protections are not limited to the law of trespass, but a trespass almost always occurs during the course of a search or seizure. As recently as *Soldal*, *supra*, this Court had held that a warrantless search accompanied by an illegal trespass cannot be justified even if it meets the probable cause standard. See also *Horton* v. *California*, 496 U.S. 128, at 136-137 (1990).

Constitutional protection for unreasonable searches and seizure by government was necessary only because, in early times, the power of the state was supreme and not restricted by notions of common law trespass. The general warrant was common in the England and had only recently been curtailed at common law at the time our Constitution was framed. The Amendment's proscription of unreasonable searches and seizures must be read in light of the history that gave rise to the words. *Chimel* v. *California*, 395 U.S. 752, 760-761 (1969). On the other hand, intrusions on privacy and property by citizens against citizens had always

been vigorously protected by the law of trespass which was one of the earliest and most fully developed notions of common law. Enforcement of the law of trespass has always been a major function of government in a well ordered society. It has been said the whole notion of tort law as we know it today evolved from the law of trespass. Criminal and civil statutes abound in our society to protect the citizenry from the evils of illegal trespass. In Michigan, *MCL 750.115* makes trespass a crime and *MCL 767.39* provides anyone who "procures" the "act constituting the offense" equally guilty with the perpetrator.

Meisling's trespass was not only at the invitation of the police, but it simply could not have occurred without the acquiescence and assistance of the police who were in command of the premises at the time he entered and searched. *Bills I* acknowledges that Meisling was probably a trespasser. (*Bills I*, App. *infra*, A-33). Aseltine and the other officers "procured" an illegal trespass and thus were equally guilty, as a matter of law, of trespass by any common law theory as well as specific Michigan Statute. Though the Court below dismissed the state constitutional claim on the ground that Michigan law provides no remedy, they were also guilty of violating the Michigan Constitution.[1]

Finally, in *Bills I*, the Court had distinguished *United States* v. *Clouston*, 623 F.2d 485, 486 (6th Cir. 1980) on

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[1] **A state court judge had found that Meisling's search violated the Michigan constitution in a suppression hearing on charges against Dennis Bills. In *Bills I*, the Court said in n. 3: "Michigan recognizes a cause of action against state and local officials for violation of the state constitution. *Smith* v. *Dep't of Public Health*, 410 N.W.2d 749 (Mich. 1987, *aff'd* 491 U.S. 58 (1989); *Marlin* v. *City of Detroit*, 441 N.W. 2d 45 (Mich. App. 1989)." (*Bills I*, App. *infra*, A-43). In *Bills II*, the Court held: "Thus, the district court properly concluded that Bills did not have a claim under the Michigan Constitution against the state and that Smith did not create a cause of action against individual officers." (*Bills II*, App. *infra*, A-7).**

the ground the telephone company employees who accompanied the officers on the search were there to assist federal officers to identify the electronic devices which were the objects of the search warrant. (*Bills I*, App. *infra*, A-30). They were present in aid of the officers executing the warrant. In *Bills II*, the Court cites Clauston for the proposition that the presence of private citizens is not always a constitutional violation. (*Bills II*, App. *infra*, A-11). It ignored the fact that Clauston and related cases were restricted exclusively to situations where the private citizen was aiding law enforcement personnel in the execution of the warrant. No other instances of lawful presence of third parties during the execution of search warrants can be found.

In denying Aseltine's defense of qualified immunity, the courts below were required to find that Meisling's intrusion violated clearly established law *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). This was a purely legal question to be determined by the trial judge prior to trial because it was improper to give the jury the issue of the defendant's objective good faith. *Harlow*, *supra*; *Donta* v. *Hooper*, 774 F.2d 716, 719 (6th Cir. 1985). As a matter of law, it was impossible for the jury to find any constitutionally reasonable basis for Meisling to be present.

The Question Is Important.

Participation by private parties in duly authorized police searches, whether it be the electronic media, a behemoth employer or mere strangers, poses a broad threat to the right to privacy that the Fourth Amendment seeks to protect. It will be very tempting for law enforcement officers to utilize civilians to conduct searches that they themselves are prohibited from performing by Constitutional law. In a way, such searches are the modern version of vigilante justice. Petitioner does not argue that the Fourth Amendment should be extended to cover private parties. Rather, she argues that police sponsorship and facilitation of such rogue

adventure is already established and has long been taken for granted. Though questions of the sort here presented are relatively recent, Justice Bradley clearly defined the duty of the Courts in *Boyd* v. *United States*, 116 U.S. 616, 635 (1886):

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but legitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close literal reading deprives them of half their efficacy, and leaves to gradual depreciation of the right as if it consisted more in sound than substance. It is the duty of the courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon."

CONCLUSION

For the reasons set forth, this petition for certiorari should be granted.

Respectfully submitted,

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Dated: July 14, 1995

APPENDIX TO PETITION FOR CERTIORARI

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OPINION
RECOMMENDED FOR FULL-TEXT PUBLICATION
-Pursuant to Sixth Circuit Rule 24-

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed April 26, 1995)

(LORRAINE BILLS, Plaintiff-Appellant, v. SGT. DENNIS W. ASELTINE, OFFICER BRIAN P. DeNOYER, OFFICER RICK DAVIS, OFFICER JEFFREY K. EWALD, OFFICER DEBRA GAWRON, OFFICER MEDBURY, and CHIEF LARRY OWEN, Defendants-Appellees — No. 92-2556; ON APPEAL from the United States District Court for the Eastern District of Michigan)

Before: MILBURN, BOGGS, and NORRIS, Circuit Judges.

BOGGS, Circuit Judge.

Plaintiff Lorraine Bills appeals from the district court's grant of summary judgment for the defendants. The case had previously been dismissed by the district court after a finding of qualified immunity, but this court reversed in part, in *Bills* v. *Aseltine*, 958 F.2d 697 (6th Cir. 1992) ("*Bills I*"). We remanded the case to resolve issues of material fact concerning whether Sgt. Dennis Aseltine, who led the search, had been "objectively unreasonable" in inviting a private security officer to accompany him in executing a search warrant, as well as to decide questions of state constitutional law. A jury concluded that the officer had not acted unreasonably, and the district court dismissed Bills's state constitutional claims as a matter of law. Because we determine that there was no legal or trial error and hold that the jury's finding as to Sgt. Aseltine precludes liability for the other defendants, we affirm the judgment of the district court.

I

In the summer of 1987, Sergeant Dennis Aseltine of the Pinckney, Michigan, Police Department obtained information that plaintiff's son, Charles Sutton, was stealing radar detectors and that his mother and stepfather, Dennis Bills, were selling them in the parking lot of the General Motors ("GM") Proving Grounds. Aseltine passed this information on to William Meisling, a security officer at GM, who informed Aseltine that GM was already investigating Mr. Bills concerning the theft of GM property. Aseltine had also heard "on the street" in the Pinckney area that Mr. Bills was in possession of stolen GM property.

On August 20, 1987, Chief Larry Owen of the Unidella Township Police called and told Aseltine that he had been notified that a stolen Kubota-brand generator was at the Billses' house. Aseltine met with Owen and his informant, who told Aseltine that he had also seen a large quantity of GM property on the premises. Aseltine was confident of the informant's reliability, so he proceeded to obtain a search warrant for the Kubota generator; he did not seek a search warrant for GM property because he felt he lacked sufficient probable cause. The warrant authorized a search of the Billses' home, garage, and adjoining shed, and also authorized the seizure of the Kubota generator.

Remembering that GM was also investigating the Billses, Aseltine called and invited Meisling to accompany the police in executing the search warrant. Aseltine also obtained the assistance of Chief Owen and officers from the Unidella Township, Hamburg Township, Livingston County and Pinckney police forces.[1]

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[1] **The police justified the large numbers of personnel based on talk in the community of automatic-weapons fire around the Billses' home, the house's location on five acres of land in the country, and the Billses' ownership of pit bulls and Doberman pinschers.**

Charles Sutton answered the door (plaintiff and her husband were not at home) and was served the warrant. Sutton immediately led Aseltine to the Kubota generator in the shed, while the other officers executed a protective sweep to secure the house. Police spotted a Yamaha-brand generator near the Kubota model, and a check of police records revealed that it was stolen. Officer Gawron of Hamburg Township was dispatched to procure a warrant for its seizure.

Meisling arrived shortly after the Kubota generator was found and seized. He accompanied the officers as they conducted a "plain view" survey of the house while they waited for Gawron to return with the search warrant. They discovered large quantities of GM parts and equipment,[2] and Meisling took 231 photographs of these items without physically disturbing any of them.

The next morning, Meisling contacted the Michigan State Police about recovering from the Billses' home what he suspected was stolen GM property. Meisling and State Trooper Darnell Seering, a friend of Meisling, met with a Livingston County prosecutor to prepare an affidavit to support a search warrant. Meisling related how Aseltine had invited him to go along on the earlier search and that he had observed and photographed GM property in the Billses' home.

A second search warrant was issued on the sole basis of Meisling's affidavit, and on August 21, Seering, Meisling, two local police officers, and two GM employees went to the Billses' residence. They seized a variety of auto parts and equipment. Mr. Bills was charged with receiving and concealing stolen property, but a state court suppressed all of the evidence seized on August 21 as being tainted by the overly broad search the day before.

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2 A sampling: nine fire extinguishers, seventy-six sets of shock absorbers, sixteen cans of glass cleaner, an antenna for an electric vehicle, several alternators and starters, an impact wrench, and six fuel injectors.

Lorraine Bills sued all the police officers involved in the searches, their respective municipalities, and the state of Michigan, under 42 U.S.C. §§ 1983, 1985, and 1988, alleging infringement of her rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. She also claimed violations of the Michigan Constitution and state law causes of action for trespass and negligent or intentional infliction of emotional distress. The district court granted summary judgment for the defendants on all of Bills's claims. On appeal, the Sixth Circuit reversed the district court's finding of qualified immunity because "genuine issues of material fact exist concerning the reasonableness of the conduct of the police in inviting a private citizen into the dwelling of another for purposes unrelated to the execution of the search warrant." *Bills I*, 958 F.2d at 709. The court also remanded the pendent state constitutional claims because they had been dismissed based on the absence of an underlying federal constitutional violation. *Ibid.*

Upon remand, in an order dated September 29, 1992, the district court dismissed Bills's claims against all of the defendants except Aseltine because the court found that all of those defendants were protected by qualified immunity. The court noted that government officials are entitled to qualified immunity while performing discretionary functions so long as their actions do not violate clearly established rights of which any reasonable official would have known. *See Harlow* v. *Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed2d 396 (1982). Finding no evidence that any of the other police officers knew Meisling was present for private purposes, the court concluded that a reasonable officer would not have questioned Meisling's presence because he had been invited by and stayed close to Aseltine. However, the court could not decide as a matter of law whether Aseltine's conduct had violated clearly established law or whether he should have known he was exceeding the scope of the search warrant by inviting Meisling. There-

fore, a jury trial was required to determine whether his conduct was reasonable. The court dismissed the remaining claims in a later order because the state of Michigan was immune to a § 1983 suit based on the actions of an individual who violated state constitutional guarantees.

The district court sent the case to a jury on the issue of whether Aseltine had "unreasonably exceeded the scope of the warrant" by procuring "a private person to tour plaintiff's home with a camera for purposes utterly unconnected with the search warrant they had already executed." The jury returned a verdict for the defendant.

II

Bills raises a variety of issues on appeal. She first contends that the district court erred in granting summary judgment to defendants on her claims arising under the state constitution. She claims that the district court erred in granting qualified immunity to all the officers except Aseltine. Bills argues that the district court abused its discretion in its use of special interrogatories, by instructing the jury on the Fourth Amendment and failing to give two of plaintiff's proposed instructions, and in allowing the defendants' witnesses to refer to property observed during the search as "stolen" or "GM property." Last, she asserts that the district court erred in denying her motion for a directed verdict. We shall deal with each contention in turn.

A. Michigan Law Governing Infringement Of State Constitutional Rights.

The district court dismissed Bills's state law claims because it found that Michigan law does not recognize a cause of action against individuals for violations of the state constitution. A district court's conclusions of law are subject to *de novo* review on appeal. *United States* v. *Braggs*, 23 F.3d 1047, 1049 (6th Cir.), *cert. denied*, ___ U.S.

___, 115 S.Ct. 274, 130 L.Ed.2d 191 (1994); *Whitney* v. *Brown*, 882 F.2d 1068, 1071 (6th Cir. 1989). An appellate court must review the evidence "in the light most likely to support the district court's decision." *Braggs*, 23 F.3d at 1049 (citing *United States* v. *Gomez*, 846 F.2d 557, 560 (9th Cir. 1988)).

The parties agree that the question of whether a cause of action exists for a violation of the state constitution is controlled by the Michigan Supreme Court's decision in *Smith* v. *Dep't of Public Health*, 428 Mich. 540, 410 N.W.2d 749 (Mich. 1987). The general rule is that "there is no implicit right to sue the state for damages on the basis of violations of . . . the Michigan constitution," although liability will be found in appropriate cases. *Id.* 410 N.W.2d at 792. A close reading reveals that *Smith* allowed suits only where "the state's liability would, but for the Eleventh Amendment, render it liable under the 42 USC 1983 [*sic*] standard for local governments articulated in *Monell* v. *New York City Dep't of Social Services* [436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)]." *Smith*, 410 N.W.2d at 794 (Boyle, J., concurring).

The United States Supreme Court in *Monell* permitted liability only where the unconstitutional action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." 436 U.S. at 690, 98 S.Ct. at 2035-36. Hence *Smith* allows Bills a cause of action only if she "alleges that defendant has violated the state constitution by virtue of custom or policy." *Marlin* v. *City of Detroit*, 177 Mich. App. 108, 441 N.W.2d 45, 48 (1989). The Sixth Circuit has similarly interpreted *Smith* as authorizing a cause of action only where the constitutional violation was pursuant to a municipality's "policy or custom." *Pleasant* v. *Zamieski*, 895 F.2d 272, 278 (6th Cir.), *cert. denied*, 498 U.S. 851, 111 S.Ct. 144, 112 L.Ed.2d 110 (1990).

However, this court has already ruled that Bills has no cause of action because she has failed to satisfy the *Monell* standard for municipal liability:

> *Neither is there any proof in the record concerning the existence of municipal policies or customs that might have resulted in the alleged unconstitutional conduct in this case.* Instead, plaintiff merely argues that, because [Aseltine and Owens] were officers of some seniority within their police departments, they must be responsible for policy . . . . This is mere argument, not evidence. . . . Plaintiff offers nothing more than the inference she draws from a single, allegedly unconstitutional action. *This is not sufficient to fix liability on the municipal defendants.*

Bills I, 958 F.2d at 708 (emphasis added). Accordingly, we affirmed the district court's dismissal of the claims against the municipalities. *Id.* at 709 (holding that there was no evidence that the officers were following a municipal custom or policy or that they were untrained or that the municipalities were deliberately indifferent to the constitutional rights of their citizens). Thus, the district court properly concluded that Bills did not have a claim under the Michigan Constitution against the state and that *Smith* did not create a cause of action against individual officers.

B. Qualified Immunity Of The Police Officers Other Than Aseltine.

Bills objects to the district court's granting of summary judgment to the other police officers on the basis of qualified immunity. "Resolution of qualified immunity is purely a question of law," *Poe* v. *Haydon*, 853 F.2d 418, 424 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007, 109 S.Ct. 788, 102 L.Ed.2d 780 (1989), and this court reviews the district court's legal determinations *de novo*. *Braggs*, 23 F.3d at 1049; *Whitney*, 882 F.2d at 1071.

The trial court is ultimately responsible for resolving the issues raised by such a defense, and the case should go to trial only if there is a genuine issue of material fact upon which the qualified immunity turns.

Heflin v. *Stewart County*, 958 F.2d 709, 717 (6th Cir.), *cert. denied*, ___ U.S. ___, 113 S. Ct. 598, 121 L.Ed.3d 535 (1992). The court in *Bills I* decided that such a factual question existed when it reversed the district court's dismissal because "genuine issues of material fact exist concerning the reasonableness of the conduct of the police in inviting a private citizen into the dwelling of another for purposes unrelated to the execution of the search warrant." *Bills I*, 958 F.2d at 709. However, since only Aseltine has been accused of inviting Meisling into the Billses' home for the search, *Bills I* did *not* resolve whether the other police officers are entitled to qualified immunity. Therefore, whether the other police officers who accompanied Aseltine are entitled to qualified immunity remains a question of law, warranting *de novo* scrutiny.

1

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley* v. *Briggs*, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986). The test for whether an official is entitled to qualified immunity is one of "objective reasonableness," which requires "a reasonably competent public official [to] know the law governing his conduct." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818-19, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).

The constitutional or statutory right alleged to have been violated must have been "clearly established" in a particularized sense:

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent.

Anderson v. *Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987) (citations omitted).

Additionally, "the district court must decide the purely legal question of whether the law at the time of the alleged action was clearly established in favor of the plaintiff." *Dominique* v. *Telb*, 831 F.2d 673, 676 (6th Cir. 1986). The Supreme Court has stressed that a court must carefully define the rule that is at issue:

> The operation of this standard, however, depends substantially upon the level of generality at which the relevant "legal rule" is to be identified. For example, the right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.

Anderson, 483 U.S. at 639, 107 S.Ct. at 3039.

The Second Circuit dealt with a case similar to this one in *Ayeni* v. *Mottola*, 35 F.3d 680 (2d Cir. 1994), *cert. denied*, ___ U.S ___, 115 S. Ct. 1689, ___ L. Ed 2d ___ (1995), but reached a contrary result. In *Ayeni*, Secret Service agents allowed a camera crew from CBS Television's "Street Stories" to accompany them while executing a search warrant. *Ayeni* may be distinguished by the court's failure to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms as a Fourth Amendment right to privacy:

> Agent Mottola correctly asserts that there is no reported decision that expressly forbids searching agents from bringing members of the press in to a home to observe and report on their activities. He therefore argues that there is no clearly established rule prohibiting such an act. The argument lacks merit. It has long been established that the objectives of the Fourth Amendment are to preserve the right of privacy to the maximum extent consistent with reasonable exercise of law enforcement duties . . . . Mottola exceeded well-established principles when he brought into the Ayeni home persons who were neither authorized by the warrant . . . nor serving any legitimate law enforcement purpose by being there. A private home is not a soundstage for law enforcement theatricals.

35 F.3d at 686. It is hard to imagine any contested search that could not be portrayed as an invasion of privacy, and even more difficult to see how a police officer could tailor his conduct under such a vague standard. As with the example of the Due Process Clause cited in *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039, the fact that the Fourth Amendment embodies "well-established" principles will not defeat a claim of qualified immunity. Otherwise, the doctrine is rendered a mere rule of pleading.

The Second Circuit cited *Bills I* for the proposition "that permitting the presence of a third party not assisting in a search *may* violate the Fourth Amendment." *Ayeni*, 35 F.3d at 686 n.8 (emphasis added). The word "may" is of great significance; the Sixth Circuit has determined that the presence of a private citizen at the execution of a search warrant is not *per se* a constitutional violation. The court in *Bills I* discussed *United States* v. *Clouston*, 623 F.2d 485 (6th Cir. 1980), which held that the attendance of telephone company employees at a search was not unconstitutional. In *Clouston*,

the employees were asked by the police to be there to help them identify company equipment. 623 F.2d at 486. Thus, under certain circumstances, the presence of private citizens at a search will not be a constitutional violation, particularly when they are assisting the police. *See* 18 U.S.C. § 3105 (1985) (authorizing persons "in aid of the officer" to accompany law enforcement officers in enforcing federal search warrants); *Huggins* v. *Oklahoma*, 861 P.2d 1007, 1009 (Okla. App. 1993) (joining "other forums" and citing *Clouston* in allowing "the use of private persons to help law enforcement officials in the execution of a search"); *People* v. *Boyd*, 123 Mis.2d 634, 474 N.Y.S.2d 661, 666 (Sup. Ct. 1984) ("[T]he five sister states that have had occasion to consider the issue of civilian assistance in search warrant situations have all ruled that police need not forego [that] type of aid . . . .").

The full parameters of the role of private citizens in executing search warrants has not been completely, or clearly, defined. *Clouston* says they may assist, *Ayeni*[3] says they may not exploit their role for commercial gain, and *Bills I* says that the reasonableness of the officer's invitation in this particular case must go to a jury, as it did.

The issue with respect to the other officers is easier to resolve than for Aseltine because they did not affirmatively act to invite Meisling; their violation, if any, is that they failed to detect and prevent Meisling's misconduct. The court in *Bills I*, like the Second Circuit in *Ayeni*, concluded that Meisling was not in the Billses' home to aid in the search. Aseltine admits as much, as the search warrant was only for the Kubota generator. However, it is unclear whether the attending officers knew or should have known that Meisling was not serving a *Clouston*-like function. This is the crucial question for purposes of their right to qualified immunity.

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[3] **Obviously, the specific rule in *Ayeni* was not clearly established at the time of the search of Billses' home.**

The qualified immunity standard in the context of the execution of a search warrant requires determination of whether a "reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *Bills I*, 958 F.2d at 705, (quoting *United States* v. *Leon*, 468 U.S. 897, 922 n. 23, 104 S.Ct. 3405, 3420 n. 23, 82 L.Ed.2d 677 (1984)). Since the policemen accompanying Officer Aseltine had no role in procuring the warrant, the test can be recast as "based on all of the circumstances, whether a reasonably well-trained officer would know that Meisling's presence violated Bills's constitutional rights despite Aseltine's having apparently authorized it."

The standard of objective reasonableness requires us to ask whether every "officer in the defendant's position, measured objectively, would have clearly understood that he was under an affirmative duty to have refrained from such conduct." *Brandenburg* v. *Cureton*, 882 F.2d 211, 215 (6th Cir. 1988), *quoting Dominique*, 831 F.2d at 676; *see Wolfel* v. *Morris*, 972 F.2d 712, 719 (6th Cir. 1992). A court should be wary of simply substituting its view in hindsight for the police officers' opinion. Assuming that it was clearly established that the presence of a private citizen who is not assisting the police is a constitutional violation, it is still not apparent that any officer other than Aseltine knew of Meisling's true role.

Bills makes several points in arguing that the attending officers should have known that Meisling was there illegally and not merely to assist the police.[4] The district court did not seem to consider these factors.

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4 Plaintiff states that Officer Gawron actually drove Meisling to the Billses' home, thinking that he was present to look for "fuzz-busters." *Pet. Brief* at 14. Consequently, she "knew she was procuring the presence of Meisling for purposes solely unrelated to the objects of the search warrant for the generator." *Ibid.* However, the testimony of Meisling and Gawron suggests that Gawron merely led Meisling to the Billses' home, after Aseltine, the other officers, and Meisling met at the police station before the search.

First, Meisling did nothing to aid the police on the scene. Instead, he walked around with Aseltine, taking photographs. Second, Meisling did not arrive until after the Kubota generator was found, so there was nothing for him to assist with. Finally, there were no affidavits from the officers stating a lack of knowledge.

The district court should also have considered various facts that suggest that the officers would not realize Meisling's presence was illegal. Meisling stayed with Aseltine. When he was in the Billses' home, Aseltine was the officer in charge of the search and the other officers were otherwise occupied in securing the premises, obtaining a warrant for the Yamaha generator, seizing a marijuana plant in plain view, and arresting Charles Sutton.

The district court did not properly view the evidence to the benefit of the non–moving party. Taking the inferences from these facts in the light most favorable to Bills, a reasonable well-trained officer might have been aware that Meisling was not assisting the police, but instead conducting an illegal search.

2

Defendants argue that the question of whether the other police officers were liable for violating Bills's constitutional rights was nonetheless mooted when the jury found that Aseltine had not been unreasonable in inviting Meisling to enter the Billses' residence. They contend that their liability can only be derivative from Aseltine's. Resolution of the issue of mootness, however, depends upon whether the reasonableness of the accompanying officers' conduct has already been resolved and thus constitutes collateral estoppel. "The availability of collateral estoppel is a mixed question of law and fact which we review *de novo*." *United States* v. *Sandoz Pharmaceuticals Corp.*, 894 F.2d 825, 826 (6th Cir.), *cert. denied*, 498 U.S. 810, 111 S.Ct. 45, 112 L.Ed.2d 21 (1990).

Collateral estoppel may be used defensively "to prevent a plaintiff from asserting a claim that the plaintiff has previously litigated and lost against another defendant." *Patrick* v. *South Central Bell Tel. Co.*, 641 F.2d 1192, 1199 n.3 (6th Cir. 1980). Four criteria must be met to preclude further litigation under the doctrine of collateral estoppel (or "issue preclusion"):

> (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; (4) the party against whom [collateral] estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Detroit Police Officers Ass'n v. *Young*, 824 F.2d 512, 515 (6th Cir. 1987).

In this case, the trial below provided a final judgment on the merits and a full and fair opportunity to litigate the issue of Aseltine's liability, thus satisfying the third and fourth parts. The second element of the test is also easily met — the jury's determination of the reasonableness of Aseltine's conduct was crucial to the outcome of the case, and it was the precise issue we remanded to the trial court to resolve. The critical issue is the first element: whether the jury's conclusion that Aseltine's invitation to Meisling was not unreasonable is determinative of the question of whether the other police officers' failure to prevent Meisling's actions was unreasonable.

We hold that Aseltine's culpability is necessary to any liability of the other officers. Aseltine actively *performed* (invited Meisling to the search) what they merely failed to prevent, and he actually *knew* what they might only suspect. The officers' alleged violations were, in

essence, "lesser included offenses" of Aseltine's, so that the jury's finding that Aseltine acted reasonably must mean that there can be no liability for failing to prevent "reasonable" actions. Thus, we find that Bills is collaterally estopped from going to a jury on the reasonableness of the attending officers' conduct. Since the officers did not act unreasonably, they are entitled to qualified immunity.

C. Propriety Of The Special Interrogatories.

Bills argues that a special interrogatory on the verdict form did not state all the issues, was inaccurate, and consequently misled the jury. The verdict form provided to the jury stated: "Was it unreasonable under the circumstances for the defendant to invite William Meisling to enter plaintiff's home on August 20, 1987?" The court submitted questions asking if Aseltine had a "reasonable and good faith belief" that he was not violating Bills's rights, and if his conduct proximately caused injury to Bills. The court also asked the jury to assess damages if appropriate. Bills contends that the court should have submitted her proposed special interrogatory: "Did Sgt. Aseltine unreasonably exceed the scope of the search warrant for the generator by permitting William Meisling, the Chief of Security at the Milford Proving Grounds, to enter the plaintiff's premises and conduct a general inspection for the suspected stolen GM property?"

Whether a court uses a special or general verdict rests in its discretion, as does the content and form of any interrogatories it chooses to submit. *Portage II* v. *Bryant Petroleum Corp.*, 899 F.2d 1514, 1520 (6th Cir. 1990). Therefore, an appellate court reviews for an abuse of discretion. Federal Rule of Civil Procedure 49 governs the use of special verdicts and general verdicts with interrogatories. A special verdict is used where the jury finds only issues of fact and the court applies the law, as opposed to a general verdict with interroga-

tories, which is used to give close attention to certain factual matters. *Portage II,* 899 F.2d at 1520.

The court below clearly used the latter. "Where special verdicts are involved, the jury's sole function is to determine the facts; therefore, neither an instruction on the law nor a summary concerning their role in relation to the law was necessary." *Id.* at 1521. The court's twenty-four jury instructions discussed legal matters in detail, and also required the jury to apply the law to the facts. The verdict form served only to direct the jury's attention to the most important issues: reasonableness, good faith, proximate cause, and damages.

Bills's proposed interrogatory is admittedly more detailed, but asks a question that is only slightly different. The plaintiff emphasizes whether Aseltine unreasonably exceeded the scope of the search warrant, while the court focuses on whether Aseltine's invitation was unreasonable. Undoubtedly, Bills would have preferred to remind the jury through the interrogatory that Meisling's presence was beyond the scope of the search warrant for the generator. However, that is the job of Bills's attorney at closing argument.

Bills cites several cases for the obvious proposition that special interrogatories must fairly present the relevant issues to the jury. Yet reasonableness, good faith, proximate cause and damage *are* the relevant issues. Further, the interrogatories must be considered in the context of the entire jury charge. *United States* v. *Buckley*, 934 F.2d 84, 87 (6th Cir. 1991). In light of the court's detailed jury instructions, the interrogatories were neither inaccurate, misleading nor confusing.

D. The District Court's Denial
Of Bills's Motion For A Directed Verdict.

At the close of the trial, plaintiff moved for a directed verdict because (1) Meisling was a trespasser as a

matter of law; and (2) Aseltine "had not presented any defense to the claim that Meisling's presence and photographic tour of the plaintiff's home, as permitted and facilitated by the police, was an unconstitutional intrusion." *Pet. Brief* at 21. An appellate court reviews a ruling on a motion for directed verdict *de novo*. *King* v. *Love*, 766 F.2d 962, 969 (6th Cir.), *cert. denied*, 474 U.S. 971, 106 S.Ct. 351, 88 L.Ed.2d 320 (1985). A directed verdict is proper only where no reasonable juror could find for the nonmoving party. *Fite* v. *First Tennessee Prod. Credit Ass'n*, 861 F.2d 884, 889 (6th Cir. 1988).

The first part of Bills's argument is meritless because whether Meisling was a trespasser under state law was not dispositive, nor relevant, to Bills's claim of a constitutional violation under 42 U.S.C. §§ 1983, 1985, or 1986. The second part of the argument completely misinterprets the law. Bills claims that: "Aseltine was required to present some constitutional justification for Meisling's intrusion. When the defendant failed to present any such evidence, the plaintiff was entitled to a directed verdict." *Pet. Brief* at 25.

This assertion could not be more incorrect. The court in *Bills I* made it clear that Meisling's presence alone would not justify a finding of liability:

> In this case, Meisling obviously had no warrant of his own, and his intrusion was separate and distinct from the police entry . . . . The matter does not end here, however, because the issue in this case is not whether Meisling's photographic tour of the premises, per se, was unconstitutional . . . .

958 F.2d at 703. In fact, the court stated explicitly that "*Meisling's inspection tour* and photographing of items in the plaintiff's home, by itself; *while perhaps constituting a trespass, does not offend the Fourth Amendment.*" *Id.* at 704 (emphasis added).

Because Bills's claim for a directed verdict has no legal foundation, the district court correctly denied her motion.

E. Sufficiency Of Jury Instruction #17 As To The Fourth Amendment And The Court's Denial Of Plaintiff's Proposed Instructions #17 And #18.

Plaintiff contends that the "entirety of the legal instruction to the jury on the Fourth Amendment requirements consisted of one sentence" and that it was a "totally improper, inaccurate, and incomplete statement of the law" because it "focuses entirely on the decision to 'invite' Meisling." *Pet. Brief* at 26. The court's instruction read as follows:

> The question that you must decide is whether, under all of the circumstances, Sgt. Aseltine unreasonably exceeded the scope of his authority under the warrant by inviting William Meisling, a private citizen, to enter plaintiff's home during the execution of the warrant on August 20, 1987.

"The standard on appeal for a court's charge to the jury is whether the charge, taken as a whole, fairly and adequately submits the issues and applicable law to the jury." *Buckley*, 934 F.2d at 87 (quoting *United States* v. *Martin*, 740 F.2d 1352, 1361 (6th Cir. 1984), *cert. denied*, 472 U.S. 1029, 105 S.Ct. 3506, 87 L.Ed.2d 636 (1985)).

Plaintiff's criticism of the above instruction lacks merit. First, the above sentence was only the *second* paragraph of the court's very lengthy Jury Instruction #17. Most importantly, its language mirrors that used by the Sixth Circuit in discussing the case:

> Thus, the principal question in this case is whether the officers exceeded the scope of their authority under the warrant in inviting Meisling to conduct an inspection of a private dwelling they controlled. . . .
>
> * * *

> . . . Whether this breached the trust under which they held the premises in their complete command, or whether, stated another way, this unreasonably exceeded the scope of the warrant, is a question for a jury in this case.

Bills I, 958 F.2d at 705. In fact, this court used similar language in remanding the case to the district court:

> [T]he district court's grant of summary judgment on the issue of the constitutionality of the search . . . is REVERSED because genuine issues of fact exist concerning the reasonableness of the conduct of the police in inviting a private citizen into the dwelling of another for purposes unrelated to the execution of the search warrant.

Id. at 709.

Moreover, the two jury instructions proposed by plaintiff are wholly inappropriate and often redundant and inaccurate. A cursory review of Plaintiff's Proposed Instruction #17 reveals it to be a short summary of plaintiff's argument, which concludes by stating: "Consequently, the principle [*sic*] issue in this case is whether or not the defendant exceeded the scope of the authority under the search warrant for the stolen generator by inviting Meisling to conduct an inspection of the plaintiff's home." This statement does not differ significantly from the district's actual instruction, or this court's explanation of the pertinent issues in *Bills I*.

Additionally, Plaintiff's Proposed Instruction #18 is unnecessary and misleading. It first notes that Meisling was not lawfully in the Billses' home, which is not legally relevant since Meisling is not a state actor and thus cannot violate the Fourth Amendment. A jury, however, could be misled into believing that a trespass by Meisling was necessarily a constitutional violation by

Aseltine. Further, the plaintiff's instruction attempts to dictate what is "reasonable,"[5] which is the ultimate issue to be decided by a jury.

F. The District Court's Decision To Allow Witnesses To Use The Terms "Stolen" And "GM Property."

Bills asserts that the district erred by allowing defense witnesses repeatedly to characterize property seen in Bills's home during the search as "stolen" or "GM property." The plaintiff claimed that these references were prejudicial and inflammatory, and counsel duly objected at trial. A district court has wide latitude to admit evidence, and an appellate court will reverse only for an abuse of discretion. *United States* v. *Rios*, 842 F.2d 868, 872 (6th Cir. 1988) (per curiam), *cert. denied*, 488 U.S. 1031, 109 S.Ct. 840, 102 L.Ed.2d 972 (1989). A reviewing court should view the evidence in the light most favorable to the proponent, minimizing its prejudicial effect and maximizing its probative value. *United States* v. *Brady*, 595 F.2d 359, 361 (6th Cir.), *cert. denied*, 444 U.S. 862, 100 S.Ct. 129, 62 L.Ed.2d 84 (1979).

In allowing testimony mentioning the GM property found in the Billses' house, the district judge recognized that defense counsel was attempting to emphasize that the plaintiff's husband and son had been engaged in wrongdoing. However, the court considered this a permissible strategy, and one that could backfire:

> [A]s an experienced trial lawyer, you, you knew that, when you bring a case such as you brought, where . . . you knew that there was going to be evidence that there was this stolen property in this house, that it shouldn't come in

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5 The instruction adds: "If the defendant aided or facilitated Meisling's presence at the plaintiff's home in order to allow Meisling to search for evidence of a crime that was totally unrelated to the stolen generator then, in that event, the defendant violated the Fourth Amendment."

> as any surprise to you that the defendant's going to, that's all they're going to do is talk about that stolen property. . . . [Y]ou can examine and say, well, you didn't steal it, so why should you lose your job? . . . And sometimes, sometimes that will, that will work for you, to your benefit, it [sic] it's over exaggerated and things like that, see. But I can't sterilize the case for you.

The judge specifically told plaintiff's counsel that he could ask Mrs. Bills if she had stolen any of the property in order to dispel any implication of wrongdoing by her. Bills's real problem is that a jury might infer that she was culpable because of the unusually large number of items in her home and because her husband and son had in fact taken GM property; that is not an entirely unreasonable inference. Since much of the property was indeed "stolen" and "GM property," plaintiff's counsel could not claim that the terminology was inaccurate.

When we maximize the relevance, minimize the prejudice, and recognize the accuracy of the references to stolen property, we hold that the judge did not abuse his discretion by allowing the witnesses to refer to "stolen" and "GM property." The information was relevant to the reasonableness of Aseltine's actions because both he and Meisling's claimed that they suspected that there was stolen property in the Billses' home. The issue of stolen property also related to Mrs. Bills's loss of her job, for which she sought damages. Further, there was a question of whether Mrs. Bills was or should have been aware of the activities of her husband and son. Although her complicity is irrelevant to whether Aseltine acted unreasonably in admitting Meisling to her home, it could relate to her claims of emotional distress allegedly suffered as a result of her privacy being invaded; a jury could conclude that one who knowingly harbors stolen property is less offended when it is eventually discovered by law enforcement personnel or civilians.

III

We hold that the district court properly granted summary judgment for defendants on Bills's claims under the Michigan Constitution, because individuals cannot be liable under Michigan law for constitutional violations. Also, the district court correctly denied plaintiff's motion for a directed verdict.

Although the district court may have erred in granting the other police officers summary judgment on the issue of qualified immunity, the jury's verdict for the defendant cures any potential error. Because Aseltine acted more affirmatively and with greater knowledge than the other officers, the jury's decision that Aseltine acted reasonably is collateral estoppel on the issue of the other officers' reasonableness, thus entitling them to qualified immunity.

Last, we hold that the content and form of the district court's general verdict form with special interrogatories, its decision to allow the defendants' witnesses to refer to the property observed in the Billses' home as "stolen" or "GM property," and the court's instructions to the jury were not abuses of discretion.

The judgment of the district court is therefore AFFIRMED.

OPINION

RECOMMENDED FOR FULL-TEXT PUBLICATION
-Pursuant to Sixth Circuit Rule 24-

(United States Court of Appeals — Sixth Circuit)

(Decided and Filed March 9, 1992)

(LORRAINE I. BILLS, Plaintiff-Appellant, v. DENNIS W. ASELTINE, et al., Defendants-Appellees — No. 91-1369; ON APPEAL from the United States District Court for the Eastern District of Michigan)

Before: MILBURN and NELSON, Circuit Judges; and HOOD, District Judge.*

MILBURN, Circuit Judge.

Plaintiff Lorraine I. Bills appeals from the district court's grant of summary judgment in favor of defendant police officers and certain municipalities within the state of Michigan. There are numerous issues in this case arising out of the execution of three search warrants at plaintiff's residence. The principal issues in this case are (1) whether police exceeded the scope of the search warrants they were executing, (2) whether the presence of private citizens at the searches rendered the searches unconstitutional, (3) whether the photography of objects by police officers within the searched premises was constitutional, (4) whether the last search warrant was tainted by a previous unconstitutional search, (5) whether the district court applied the proper standards for determining qualified immunity and municipal liability, and (6) whether the district court properly dismissed plaintiff's claim of violations of her rights under the Michigan Constitution. For the reasons that follow, we affirm in part and reverse in part.

*** Honorable Joseph M. Hood, United States District Judge for the Eastern District of Kentucky, sitting by designation.**

I.

Plaintiff Lorraine Bills, her husband, Dennis Bills, and her two sons, Charles and Howard Sutton, resided at 5401 West M-367, Pinckney, Michigan. On August 20, 1987, defendant Dennis Aseltine, a police sergeant of the Village of Pinckney Police Department, obtained information from an informant that a stolen Kubota generator could be found at the Bills' residence and that a large number of General Motors parts and tools were also located there. Although Sergeant Aseltine knew that both Dennis and Lorraine Bills worked at the General Motors Proving Grounds in Milford, Michigan, and that the General Motors parts and tools described by the informant might be stolen, he obtained a search warrant only for the Kubota generator.

The warrant authorized the search of the Bills' ranch-type house, its attached garage, and a shed attached to the back of the garage. Before executing this warrant, Sergeant Aseltine contacted William Meisling, a security officer at General Motors, and invited him to accompany the police in their execution of the search warrant in the property in the Bills' residence. Sergeant Aseltine also obtained the assistance of Larry Owen, police chief of the Unidella Township Police Department, Officers Gawron and Medburyof the Hamburg Township Police Department, Deputy John Haischer of the Livingston County Sheriff's Department, and Officers Brian DeNoyer, Jeffrey Ewald, and Rick Davis, all, like Aseltine, officers of the Pinckney Police Department.

At approximately 8:15 p.m. on August 20, 1987, the police officers sought admittance to the Bills' residence. Charles Sutton, plaintiff's son, answered the door and admitted the police. The search warrant was served on Sutton, who led Sergeant Aseltine to the stolen Kubota generator located in the shed attached to the garage while other officers conducted a sweep of the house. Near the Kubota generator, the police officers observed a Yamaha generator with its serial numbers in plain

view. A check of police records revealed the Yamaha generator to be stolen as well, and Officer Gawron was dispatched to obtain a warrant for its seizure.

In the meantime, Officer Haischer and Chief Owen had noticed a large marijuana plant growing in the kitchen of the residence. After Sutton admitted the plant belonged to him, Officer Haischer seized the plant and removed it to his patrol car.

Shortly after the Kubota generator was located and seized, William Meisling, the General Motors security officer, arrived. A group of officers, including Sergeant Aseltine and Meisling, then entered plaintiff's home where they found quantities of what appeared to be General Motors parts and equipment stacked in the basement. The officers found quantities of General Motors parts and equipment, particularly shock absorbers, in a large crawl space about four feet high beneath the house. Meisling took 231 photographs of the parts and equipment without physically disturbing any of it. This activity occurred while officers remained on the premises awaiting the return of Officer Gawron with the warrant for the Yamaha generator.

Charles Sutton had been arrested, handcuffed, and placed in a police vehicle soon after the first stolen generator was located. His mentally retarded brother, Howard Sutton, was found within the house and was turned over to neighbors for safekeeping. Neither plaintiff Lorraine T. Bills nor her husband was present during the search.

On August 21, 1987, William Meisling contacted the Michigan State Police to seek assistance in recovering what he believed to be the stolen General Motors property he had seen within the Bills' residence on the previous day. Trooper Darnell Seering, a friend of Meisling's, was assigned the investigation. Meisling and Seering went to the Livingston County Prosecutor's Officer where Assistant Prosecutor Thomas Bahen pre-

pared an affidavit for a search warrant based on Meisling's observations. In this affidavit, Meisling related how Sergeant Aseltine had invited him to accompany the police on the previous day's search of the Bills' residence and recounted how he had observed and photographed a large quantity of parts and equipment belonging to General Motors.

Trooper Seering had not been present at the previous search of the Bills' residence, and he did not review the affidavit prepared by Bahen for Meisling. On the basis of that affidavit, a search warrant was duly issued, and on that same day, August 21, 1987, at approximately 7:00 p.m., Trooper Seering and two local police officers, accompanied by Meisling and two other General Motors employees, executed the warrant by seizing five fire extinguishers, seventy-six shock absorbers, an air drill, two alternators, a flare kit, an electric impact wrench, and several pieces of metal bar stock.

Dennis Bills was subsequently charged with receiving and concealing stolen General Motors property in violation of Michigan Compiled Laws § 750.535, but on January 20, 1989, the Livingston County Circuit Court suppressed from evidence all the General Motors property taken from the Bills' residence on August 21, 1987. It took this action because it believed that the search on August 20, 1987, was overly broad and tainted Seering's search on the following day.

The sole plaintiff in this case is Lorraine I. Bills, who filed this action on August 28, 1989, seeking damages against the various police officers and their agencies. In her complaint, plaintiff sought to recover, pursuant to 42 U.S.C. §§ 1983, 1985, and 1988, for alleged violation of her rights secured by the Fourth, fifth and Fourteenth Amendments to the United States Constitution. Additionally, the complaint contained pendent state claims for trespass, negligent or intentional infliction of emotional distress, and violation of the Michigan Constitution.

All defendants filed motions for summary judgment. The district court granted these motions by order dated February 6, 1991, and this timely appeal followed.[1]

II.

A.

This court reviews a district court's grant of summary judgment de novo, viewing all the facts and inferences flowing therefrom in the light most favorable to the nonmoving party. *Pinney Dock & Transp. Co.* v. *Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir.), *cert. denied*, 488 U.S. 880, 109 S.Ct. 196, 102 L.Ed.2d 166 (1988). When a motion for summary judgment is filed, the moving party carries the burden of showing that no genuine issue of material fact exists. In the face of a summary judgment motion, however, the nonmoving party may not rest on its pleadings, but must come forward with some probative evidence to support its claim and make it necessary to resolve the differences at trial. *Celotex Corp.* v. *Carrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); *60 Ivy St. Corp.* v. *Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987).

"By its very terms, the standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). The dispute between the parties must be genuine, and the facts

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[1] **General Motors Corporation and William Meisling, although originally named as defendants in this action, entered into a settlement agreement with plaintiff and were dismissed from this action on August 16, 1990. On August 2, 1991, this court dismissed plaintiff's appeal as to Livingston County, Livingston County Sheriff's Department and Deputy John Haischer based on a settlement and stipulation for dismissal in the district court.**

must be such that, if they were proven at trial, a reasonable jury could return a verdict for the nonmoving party. *60 Ivy St. Corp.*, 822 F.2d at 1435. If the disputed evidence "is merely colorable . . . or not significantly probative . . . summary judgment may be granted." *Anderson*, 477 U.S. at 249-50, 106 S. Ct. at 2511 (citations omitted).

B.

Plaintiff argues that defendants violated her Fourth Amendment rights when they searched her home on August 20, 1987. In support of this contention, plaintiff makes two arguments. First, she argues that the police entry and seizure of her house was unnecessary because her son, Charles Sutton, led officers directly to the Kubota generator in the shed attached to the garage. This argument ignores the fact that the warrant in question indisputably authorized a search of the house, and an "initial team" had been assigned to enter the living quarters for the purposes of securing them during the course of the search. The district court found that "the officers entered the home on the authority of the search warrant, *before* the generator had been located . . . ." J.A. 33 (emphasis added). The record supports this interpretation of events.

Plaintiff's second argument has to do with the presence of William Meisling, the General Motors security officer who entered plaintiff's home and property at the invitation of Sergeant Aseltine of the Pinckney Police Department. In the company and under the supervision of Sergeant Aseltine, Meisling moved through the garage, the shed, and most of the areas of the home, including the basement and the crawl space, taking 231 photographs of items he believed might belong to General Motors. It is undisputed that Aseltine personally invited Meisling to attend the execution of the search warrant on August 20, 1987, and that he did so because he thought Meisling might be able to recognize some

stolen General Motors property in plain view if he could enter the premises. Sergeant Aseltine stated in his deposition that he did not invite Meisling along because he though Meisling could assist or be helpful with respect to the search for the Kubota generator. He also stated that he had consulted no one before inviting Meisling, and that he had recovered the generator, which was the sole target for the search warrant, *before* Meisling arrived at plaintiff's home. It is therefore undisputed that Meisling was not on the premises for the purpose of the search warrant, and, in fact, the search authorized by the warrant was completed before Meisling arrived. Plaintiff argues that Meisling's presence and photographic activities were unreasonable.

The district court rejected this argument in reliance on *United States* v. *Clouston*, 623 F.2d 485 (6th Cir. 1980) (per curiam). In *Clouston*, federal officers had been issued a warrant to search for and seize certain electronic devices useful for the surreptitious interception of wire communications in violation of federal laws. The federal agents invited two security officers from the local telephone company to accompany them in the execution of the warrant in order to identify telephone company equipment. The district court suppressed all the fruits of the search — both the unlawful devices and telephone equipment — and this court reversed, relying primarily on 18 U.S.C. § 3105, which provides that search warrants may be served by specified officers and by no other person "except in aid of the officer on his requiring it, he being present and acting in its execution."

Clouston is distinguishable from this case in at least two respects. First, 18 U.S.C. § 3105 applies only to searches executed by federal officers. The search in this case was by state officers. Second, in *Clouston* we found it to be

> clear that the telephone company employees were present on the premises *in aid of the officers* who were authorized to conduct a search

> for electronic devices, that they were there at the request of the officers and that the officers were present and acting in the execution of the warrant.

Id. at 486-87 (emphasis added). Thus, in *Clouston,* the telephone company employees assisted federal officers in identifying electronic devices having to do with the interception of telephone communications and were present in "aid of the officers . . . in execution of the warrant." By contrast, in the present case, Meisling was present, not in aid of the officers or their mission, but for his own purposes involving the recovery of stolen General Motors property not mentioned in any warrant. Moreover, the execution of the first warrant was complete by the time Meisling arrived at plaintiff's home. Therefore, it cannot be maintained that the officers were acting "in execution of the warrant" at the time Meisling was permitted to "tour" the premises. Indeed, the facts show that the officers' continuing presence at the scene was for the purpose of securing it while Officer Gawron obtained a second warrant to authorize the seizure of the Yamaha generator. Thus, the district court's reliance on *Clouston* in this case is misplaced because 18 U.S.C. § 3105 does not apply to state searches and because Meisling was acting for his own purposes rather than any purpose of the officers in the execution of their warrant.

A case more on point, although not directly so, is *United States* v. *Sanchez,* 509 F.2d 886 (6th Cir. 1975). In *Sanchez,* state officers with a warrant to search for narcotics learned that there might also be explosives on the premises they intended to search. They called a special agent at the Bureau of Alcohol, Tobacco and Firearms ("A.T.F.") to assist them in the search as an expert in explosives. The search turned up no narcotics, but the A.T.F. agent discovered in plain view two containers containing seventy pounds of explosives.

In response to defendant's motion to suppress, the government defended its evidence on the grounds that its agent was properly on the premises because he had accompanied local police at their request and entered under a valid search warrant. This court rejected that argument.

> We find this argument unpersuasive. We believe that the warrant authorized only the local officers to enter and search the Sanchez property for narcotics. It could not be used to validate the entrance of a federal officer having both probable cause and the opportunity to obtain a second warrant to search for different items of property.

Id. at 889. The basis of the court's holding was that the A.T.F. agent had two hours within which he could have obtained his own search warrant to search for explosives and that his failure to obtain a warrant under those circumstances rendered his presence in the Sanchez home unconstitutional. In its analysis, this court viewed the case as one of multiple intrusions.

> On the facts of this case, there were two simultaneous but distinct intrusions, each conducted by separate agencies for the purpose of securing different types of property. Each search had to be authorized independently by a separate warrant unless the warrant requirement was excused by a valid exception.

Id. at 889. This court also recognized that "the crucial issue presented by this case [was] whether the federal agent had a right to be on the premises. . . ." *Id.* at 890. We found that

> [b]ecause the A.T.F. agent had no right to be on Sanchez premises during the raid, he did not satisfy the threshold requirement of the plain view doctrine and thus his warrantless seizure of the explosives was unconstitutional.

Id.

The facts in the present case are somewhat similar to those in *Sanchez*, except that there may be some question as to whether any officer had probable cause to obtain a warrant for the search for General Motors property. Otherwise, the cases are similar in that the federal agent in *Sanchez* was certainly not present to assist local narcotics officers in their search for narcotics — he was searching strictly for explosives. His presence was therefore treated as a separate and distinct intrusion, and this court required a constitutional justification for that intrusion. Finding none, it reversed.

In this case, Meisling obviously had no warrant of his own, and his intrusion was separate and distinct from the police entry because he entered the premises for purposes other than the execution of the search warrant. His entry might have been justified if he had been present to assist the local officers, but Sergeant Aseltine admitted that was not Meisling's purpose. Therefore, Meisling's inspection tour of the innermost parts of plaintiff's home was not authorized by any legal process or any known legal doctrine.

The matter does not end here, however, because the issue in this case is not whether Meisling's photographic tour of the premises, per se, was unconstitutional, nor is the question whether the items he observed should be suppressed. This is a civil action for damages against state police officers and their employers, and the question is whether *those* defendants committed acts that resulted in a constitutionally unreasonable intrusion into plaintiff's residence. It is also important to bear in mind that the rights afforded by the Fourth and Fourteenth Amendments protect citizens only against governmental action. As the Supreme Court put it in *Burdeau* v. *McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 576, 66 L.Ed. 1048 (1921), the Fourth Amendment "was intended as a restraint upon the activities of sovereign authority, and was not intended to be a limitation upon other governmental agencies . . . ." Thus,

Meisling's inspection tour and photographing of items in plaintiff's home, by itself, while perhaps constituting a trespass, does not offend the Fourth Amendment. The critical question in this case is whether the police officers engaged in any constitutionally unreasonable act in permitting or facilitating Meisling's presence in plaintiff's home.

When police obtain a warrant to search the home of a citizen, they concomitantly receive certain limited rights to occupy and control the property. Within the bounds of their warrant, the police may enter the property in question, may search for the items described in their warrant, may detain persons found on the premises during the search, and they may take such reasonable action as is necessary to protect themselves during the execution of the warrant. Together with the right to conduct these activities on a citizen's property goes the obligation to do so in a reasonable manner.

In *Michigan* v. *Summers*, 452 U.S. 692, 101 S.Ct. 2587, 69 L.Ed.2d 340 (1981), the Supreme Court declared that it was "constitutionally reasonable" for police officers to detain a citizen at his residence while that residence was searched pursuant to a warrant. The Court stated:

> Thus, for Fourth Amendment purposes, we hold that a warrant to search for contraband founded on probable cause *implicitly* carries with it the *limited* authority to detain the occupants of the premises while a proper search is conducted.

Id. at 704, 101 S.Ct. at 2595 (emphasis added). Also, implicit in the authority conferred on police offices by a valid warrant is the authority to secure the premises to be searched in order to minimize the risk of harm to the officers. The Court in *Summers* recognized this in its statement that "[t]he risk of harm to both the police and the occupants is minimized if the officers routinely exercise *unquestioned command* of the situation." *Id.* at 702-03, 101 S.Ct at 2594 (emphasis added). Thus, typi-

cally, police officers executing search warrants sweep the described premises to determine whether other persons are present and whether the premises are safe before they undertake the exact search specified by their warrant. In *United States* v. *Elkins*, 732 F.2d 1280, 1285 (6th Cir. 1984), for example, this court refused to suppress evidence found in plain view during a "protective sweep" of the premises after the *warrantless* entry of a dwelling was justified by exigent circumstances.

> Once having entered the premises, the agents were then required to secure all persons therein and to make a protective sweep for the weapons Elkins was known to favor, for the safety of all concerned. This was done with *minimal intrusion*, and the agents and occupants waited together in the den from 6:30 to 8:00 p.m. for a search warrant to arrive.

Id. (emphasis added). The fact that officers may have a warrant to enter would not make a protective sweep any less necessary or prudent.

Therefore, where an intrusion is justified, whether by warrant or by probable cause and exigent circumstances, police are temporarily placed in control of the premises and its occupants. It is as though the premises were given to the officers in trust for such time as may be required to execute their search in safety and then depart. Officers in "unquestioned command" of a dwelling may violate that trust and exceed the scope of the authority implicitly granted them by their warrant when they permit unauthorized invasions of privacy by third parties who have no connection to the search warrant or the officers' purposes for being on the premises. The warrant in this case implicitly authorized the police officers to control and secure the premises during their search for a generator. It did not implicitly authorize them to invite a private security officer to tour plaintiff's home for the purpose of finding General Motors property, thereby discovery evidence that might be of

some use in a prosecution unrelated to that involving the Kubota generator.

Thus, the principal question in this case is whether the officers exceeded the scope of their authority under the warrant in inviting Meisling to conduct an inspection of a private dwelling they controlled. In *Hill* v. *McIntyre*, 884 F.2d 271, 277 (6th Cir. 1989), this court held that questions involving the manner in which a search warrant was executed were questions for the jury in civil actions brought under 42 U.S.C. § 1983. This court recognized that

> the test for the entry itself and all subsequent conduct is whether these are *reasonable*. As the Supreme Court has said, this is the "ultimate standard . . . embodied in the Fourth Amendment." *Michigan* v. *Summers*, 452 U.S. 692, 699-700, 101 S. Ct. 2587, 2593, 69 L.Ed.2d 340 (1981).

Id. at 277 (emphasis added). This court then concluded that the district court's directed verdict for the defendants was improper because issues concerning the manner in which the search warrant was executed turned on factual questions that should have been submitted to the jury.

> On the separate question whether the Hills have presented evidence sufficient to raise a jury question as to whether the *manner* in which the warrant was executed was reasonable, . . . we conclude that the directed verdict was improper. Under this rubric, therefore, we remand three questions for trial to a jury: were the officers reasonable in breaking open the front door, in detaining Alicia Hill at gunpoint, and in conducting a search as extensive as this one was?

Id.

There are serious issues remaining in this case as to the constitutional reasonableness of the execution of

the search warrant. The available evidence seems to show that police actively procured a private person to tour plaintiff's home with a camera for purposes utterly unconnected with the search warrant they had already executed. Whether this breached the trust under which they held the premises in their complete command, or whether, stated another way, this unreasonably exceeded the scope of the warrant, is a question for a jury in this case. Summary judgment should not have been granted.

Plaintiff raises other issues in her brief concerning the seizure of a seven foot tall marijuana plant and other loose marijuana found in plain view in her house. Plaintiff's confused arguments seem to insist that it was unreasonable for officers to enter the home because the stolen generator they were looking for was located in the shed. These arguments are meritless because, as earlier stated, officers have the implicit authority under a search warrant to conduct a protective sweep to assure their safety and their control over the premises. Here, the marijuana plant was observed by officers as they stood in the kitchen talking to Charles Sutton. The loose marijuana was discovered in plain view by officers during the protective sweep of the house. It was their duty to seize any obvious contraband coming into their plain view.

C.

The district court granted summary judgment in favor of defendant Darnell Seering, the Michigan State Trooper who participated in the search for General Motors property on August 21, 1987, on the grounds that the record showed him entitled to qualified immunity. Plaintiff argues that Seering could not be entitled to qualified immunity because he must have known that Meisling's presence on the Bills' property the preceding day was unconstitutional and that, even though the magistrate issued a warrant for the seizure of the Gen-

eral Motors property, the warrant was constitutionally defective, based as it was on Meisling's prior unauthorized inspection of the Bills' home.

In *Harlow* v. *Fitzgerald,* 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the Supreme Court established the "objective reasonableness" test for determining qualified immunity. Under the particular facts in this case, that test asks whether "a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization." *United States* v. *Leon,* 468 U.S. 897, 922 n. 23, 104 S.Ct. 3405, 3420 n. 23, 82 L.Ed.2d 677 (1984).

The record shows that Seering interviewed Meisling on August 21, 1987, before taking him to the county prosecutor who prepared the affidavit for a search warrant. Meisling told Seering, and later the prosecutor, that he had been present in the Bills' home on August 20, 1987, at the invitation of the Pinckney Police Department and that he had seen various pieces of General Motors property while on the premises. Seering stated in his deposition that he believed Meisling must have been lawfully on the Bills' premises because "[h]e went there in the execution of a search warrant and was invited along." J.A. 384.

An objectively reasonable police officer in Seering's position would not have thought it necessary to conduct a personal analysis of the legality of Meisling's presence at the Bills' premises on the preceding day, particularly so since Meisling's affidavit was approved by the county prosecutor and a search warrant was duly issued by the magistrate. However, had Seering indulged in such an analysis, he might well have concluded that Meisling's plain view observations on the Bills' premises were, at most, a "private search" and that there was no *constitutional* infirmity in the manner in which Meisling acquired his information. *Burdeau* v. *McDowell,* 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921); *United States* v. *Barry,* 673 F.2d 912, 915 (6th Cir.), *cert.*

denied, 459 U.S. 927, 103 S.Ct. 238, 74 L.Ed.2d 188 (1982). The law in that regard is "clearly established."

As to whether Seering had any obligation to conduct a further analysis of Meisling's statement that he participated in the previous search because he was invited to by the Pinckney Police Department, it is highly doubtful that a reasonably well-trained officer would have pressed Meisling with fine questions to determine whether Meisling joined the search party to assist the execution of the warrant or for unrelated purposes of his own. In any event, Seering's deposition indicates that Meisling told him only that he had been present to assist in the execution of a search warrant, and it was objectively reasonable for Seering to accept that explanation. It follows that an objectively reasonable officer in Seering's' position would have suspected no infirmity in the manner by which Meisling obtained his information concerning the presence of General Motors property on the Bills' premises, and, therefore, the district court was correct in concluding that Seering was shielded from liability by the doctrine of qualified immunity.

Plaintiff also argues that Seering improperly allowed Meisling and two other General Motors security officers to assist him in the execution of the search for General Motors property on August 21, 1987. The General Motors personnel were present for the purpose of assisting Seering in the identification of the property described in the search warrant. This factor distinguishes this situation from the situation obtaining on August 20, 1987, when Meisling was present, but not for the purpose of assisting the police in the execution of their warrant. Police may constitutionally call upon private citizens to assist them and where assistance is rendered in aid of a warrant, and not for some other purpose, the bounds of reasonableness have not been overstepped. *See United States* v. *Clouston*, 623 F.2d 485 (6th Cir. 1980).

Plaintiff also argues that Seering seized items not described in the warrant he was executing and states

that "there was no valid reason to omit those items on the warrant request." Brief of Appellant at 35. Plaintiff does not bother to specify the items seized which allegedly were not mentioned in the search warrant, nor does she advise this court of the circumstances of their seizure. The district court found that "the additional items were also believed to be stolen GM property and were properly seized," a conclusion supported by the record, which indicates that Seering seized such "additional items" as Meisling could identify as stolen General Motors property. This was justified under the plain view doctrine of *Coolidge* v. *New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

D.

Plaintiff argues that Meisling, Sergeant Aseltine, and Officer Gawron took photographs of the Bills' premises on August 20, 1987, and that the photographs themselves constituted a warrantless search and seizure. The district court held that "[p]hotographing these items in 'plain view' was not a seizure."

There are two distinct sets of photographs to be dealt with in this analysis. One set was taken by Meisling and consisted of 231 photographs of parts and equipment thought to be the property of General Motors. The other set of photographs was taken by police officers who recorded various things they saw, including guns in a gun cabinet, the marijuana plant, and automotive parts and equipment. With respect to photographs taken by police officers, this court has held that an officer executing a search warrant for "obscene magazines" could photograph various scenes of the interior of the building he searched, including stacks of sexually explicit books and magazines, and the business license of the commercial enterprise in question. This court found that

> [t]he search warrant having been a valid one, it follows that Agent Dauwalder had the right to be

> in the positions which afforded him a plain view of the scenes photographed at [the] warehouse.

United States v. *Espinoza*, 641 F.2d 153, 167 (4th Cir.), *cert. denied*, 454 U.S. 841, 102 S.Ct. 153, 70 L.Ed.2d 125 (1981). Because it was well-settled that "mere evidence" may be the subject of a lawful seizure, the court reasoned that "Agent Dauwalder did not exceed the scope of the warrant by making the photographs of what he saw in plain view and to that extent 'seizing' those views themselves as evidence." *Id.* If it was reasonable for the agent in *Espinoza* to photograph "mere evidence" in his plain view, then it was reasonable for the police officers in this case to do the same, because, like the agent in *Espinoza*, their search warrant gave them a lawful right to be on the premises.

In *Arizona* v. *Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987), the Supreme Court held that the mere recording of serial numbers of certain pieces of stereo equipment did not constitute a seizure because the recording "did not 'meaningfully interfere' with the respondent's possessory interest in either the serial numbers or the equipment. . . ." *Id.* at 324. By a parallel process of reasoning, it follows that the recording of visual images of a scene by means of photography does not amount to a seizure because it does not "meaningfully interfere" with any possessory interest. Thus, under the Supreme Court's reasoning, photographs taken by the police officers in this case would not constitute a seizure. Because the police officers in this case were properly on the Bills' premises, they could record by photography scenes presented to their plain view.[2]

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[2] **The officer in *Hicks* entered the premises in question without a warrant but under exigent circumstances and with probable cause to believe an armed man and weapons might be found therein. He recorded the numbers from stereo equipment which, because of its high quality, appeared to be out of place in the shabby apartment.**

(***concluded on page A-41***)

On the other hand, the photographs taken by Meisling are in a different category because, as the previous discussion has concluded, Meisling was not lawfully on the premises. He had no right to the plain views he recorded by photograph, and the officers had no authority to procure and permit his presence for purposes utterly unrelated to the execution of their warrant. Because Meisling is no longer a defendant in this case, we need not decide whether Meisling's photograph was an unconstitutional seizure.

E.

Plaintiff next argues that the district court erred in granting summary judgment in favor of all the municipal defendants in this case. Plaintiff contends that constitutionally unreasonable activities of the police officers were the result of the polices or customs of the local governments and that those governments not only failed to train their police officers but that they were deliberately indifferent to the inadequate state of the training. *See City of Canton* v. *Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

The district court held that plaintiff had failed to present any evidence that police officers were inadequately trained or that the municipal defendants were deliberately indifferent to the alleged state of inadequate training. Indeed, there is no proof in the record to support such an allegation. Neither is there any proof in the record concerning the existence of municipal policies or customs that might have resulted in the alleged unconstitutional conduct in this case. Instead, plaintiff merely argues that, because Sergeant Aseltine and Chief

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(*continued from page A-40*)

Thus, his making a record of the identification of the stereo equipment was unrelated to the purposes for which he originally entered the apartment. It thus appears that the property of which a record is made, by notation or photograph, need not be related to the purpose that authorized the initial entry onto the premises.

Larry Owen were officers of some seniority within their police departments, they must be responsible for policy and, therefore, the municipalities have such policies.

This is mere argument, not evidence. Facts may be established by inference, but the inferences must be reasonable ones, and those urged upon this court by plaintiff amount only to the kind of "merely colorable" evidence that will not withstand a well-supported motion for summary judgment. *Anderson*, 477 U.S. at 249-50, 106 S.Ct. at 2510-11 (1986). Moreover, as the Supreme Court has stated,

> Proof of a single incident of unconstitutional activity is not sufficient to impose liability under *Monell* [v. *Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)], unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policy maker. Otherwise the existence of the unconstitutional policy, and its origin, must be separately proved.

City of Oklahoma City v. *Tuttle*, 471 U.S. 808, 824, 105 S.Ct. 2427, 2436, 85 L.Ed.2d 791 (1985). Plaintiff offers nothing more than the inference she draws from a single, allegedly unconstitutional action. This is not sufficient to fix liability on the municipal defendants.

F.

Finally, plaintiff argues that the district court improperly dismissed her state law claim for violations of the Michigan Constitution. The district court dismissed those claims because it found that "plaintiff's state law claims of violation of her right to privacy under the Michigan constitution and civil trespass, rest on her claims of illegal search and seizure." J.A. 36. Because the district court found no illegal search or seizure under the Fourth Amendment, it dismissed all pendent

state claims, including the state constitutional claim. *Webb* v. *McCullough*, 828 F.2d 1151, 1160 (6th Cir. 1987). However, because plaintiff does have a federal cause of action against one or more of the police officers who were on her premises on August 20, 1987, for violation of her Fourth Amendment rights, the district court's rationale fails and the state constitutional claim must be considered.[3]

G.

Plaintiff has not appealed the district court's dismissal of her pendent state law claims for trespass and the intentional or negligent infliction of emotional distress. Therefore, the district court's action in that regard is not before this court.

III.

For the foregoing reasons, the district court's grant of summary judgment on the issue of the constitutionality of the search on August 20, 1987, is REVERSED because genuine issues of material fact exist concerning the reasonableness of the conduct of the police in inviting a private citizen into the dwelling of another for purposes unrelated to the execution of the search warrant. However, the district court's grant of summary judgment in favor of Trooper Seering is AFFIRMED on the ground that Seering is entitled to qualified immunity under the facts of this case. The district court is also AFFIRMED as to its ruling that photographs taken at plaintiff's home by police officers were properly made. Similarly, the district court's dismissal of the defendant municipalities is AFFIRMED because there is no evidence in the record to show that the police officers were following a municipal policy or custom when they invited Meisling to

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[3] **Michigan recognizes a cause of action against state and local officials for violation of the state constitution. *Smith* v. *Dep't of Public Health*, 410 N.W.2d 749 (Mich. 1987) *aff'd*, 491 U.S. 58 (1989); *Marlin* v. *City of Detroit*, 441 N.W.2d 45 Mich. App. (1989).**

attend the search on August 20, 1987, nor is there any evidence to show that the police officers in question were untrained or that the municipalities were deliberately indifferent to the constitutional rights of their citizens.

Finally, the district court's dismissal of plaintiff's pendent state constitutional claim is REVERSED. Because we decide that plaintiff may maintain an action based on the theory that her constitutional rights were violated, the district court's rationale for dismissing the plaintiff's state constitutional claim fails.

(2)

Supreme Court, U.S.
FILED
AUG 17 1995
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No. 95-089

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

LORRAINE BILLS,

Petitioner,

v.

SGT. DENNIS W. ASELTINE, OFFICER BRIAN P. DeNOYER, OFFICER RICK DAVIS, OFFICER JEFFREY K. EWALD, OFFICER DEBRA GAWRON, OFFICER MEDBURY and CHIEF LARRY OWEN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the decisions by the Sixth Circuit in *Bills I* and *Bills II* and by the Second Circuit in *Ayeni* are in conflict and therefore serve as a basis for further review by this Court?

2. Whether a private security officer's conduct in being present on the premises during a search by state law enforcement officers is subject to Fourth Amendment protection?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Between May and August, 1987, Sergeant Dennis W. Aseltine of the Pinckney (Michigan) Police Department received information concerning alleged criminal conduct by Dennis Bills and Lorraine Bills at the General Motors Proving Grounds in Milford, Michigan. Aseltine had been informed that Charles Sutton, son of Lorraine Bills, had stolen radar detectors and given them to his mother and stepfather (Dennis Bills) who were selling them in the parking lot of the proving grounds. Sgt. Aseltine contacted William Meisling, a security officer at General Motors, and provided him with this investigative information. In turn, Meisling informed Aseltine that General Motors' security had been investigating Mr. Bills for allegedly stealing General Motors' property. Sgt. Aseltine had also received information that Mr. Bills was in possession of stolen General Motors property from discussions "on the street" in the Pinckney area.

On August 20, 1987, at approximately 5:40 p.m., Sgt. Aseltine received a telephone call from Chief Larry Owen of the Hamburg Township Police, who informed Aseltine that he (Owen) had been told that a stolen Kuobota generator was at the Bills' residence located at 5401 West M-36 in Pinckney, Michigan. At approximately 6:00 p.m. on August 20, 1987, Sgt. Aseltine personally met with Chief Owen and his informant, Mr. Art West, whose information was regarded as reliable. At the same time, Mr. West told Sgt. Aseltine that there was a large amount of new General Motors' property on the premises; he said that the Bills' home "looked like a General Motors warehouse."

Based on all of the information in his possession, Sgt. Aseltine contacted the Prosecutor and proceeded to obtain a search warrant for the Kuobota generator. He did not try to secure a warrant for the suspected stolen

General Motors' property, because he did not feel he had sufficient probable cause at the time.

Due to the ongoing investigation by the Village of Pinckney and General Motors in connection with the Bills family, Sgt. Aseltine contacted Meisling of General Motors to advise him of the situation and to invite him to accompany the police in the execution of the search warrant for the stolen generator. Meisling accepted the invitation and went with the police to identify anything visible that he felt was stolen General Motors' property; he considered his involvement to be proper.

Sgt. Aseltine and several other police officers went to the Bills' residence (a ranch home on a large lot in an agricultural/rural area) to execute the search warrant. Meisling arrived soon thereafter. As police approached the house, Charles Sutton, Lorraine Bills' son, came to the gate and opened it. Neither Lorraine Bills nor her husband, Dennis Bills, were home, but her two sons, Charles and Howard Sutton, were both inside the residence or on the premises.

The police entered the Bills' home for the purpose of the search and to secure the premises for the safety of both the occupants and those law enforcement officers involved in the search. Prior to this search, the Pinckney Police Department had received reports of automatic weapon fire coming from the Bills' property. Also, the police were aware that there were dogs (Dobermans and pit bulls) kept on the property.

Upon being shown the search warrant, Charles Sutton took Sgt. Aseltine to the location of the stolen Kuobota generator, i.e., through the garage and into the attached shed. Sutton admitted the generator was stolen. Soon after the discovery of the first stolen generator, a second generator was located in the same shed. A theft report

had been taken previously by the police with the information received matching this second generator. After obtaining telephonic authorization from the Livingston County Prosecutor, Police Officer Gawron prepared a second warrant. This second warrant was issued, and then executed within two hours after the first generator was found. The second warrant also authorized entry into the Bills' residence.

Between execution of the first and second warrants, the premises were secured while the search warrant application was prepared and the second search warrant was obtained from a magistrate.

While present at the scene, Meisling stayed with Sgt. Aseltine. After the discovery of the first generator, Sgt. Aseltine remained at the Bills' residence for approximately one hour to one hour and fifteen minutes to assist in security until the second warrant was executed. At one point, Sgt. Aseltine was called into the Bills' house and informed that there was a marijuana plant in the residence. The marijuana plant (which was visible through a window from outside the residence) was seized by the police as contraband in plain view in a room off the kitchen of the house.

The police went into the basement of the home for the purpose of securing the premises and to make certain there were no other persons present who could pose a threat to the police officers. They saw marijuana in plain view on a counter top. They also saw items of General Motors' property lining basement shelves, along with a quantity of guns including what appeared to be automatic rifles.

While the police were in Bills' home, they never opened any drawers. Nothing was opened, uncovered or moved by Meisling. Nothing was removed or seized from the premises other than the two stolen generators; no

General Motors' property was seized that evening. The police did take photographs of the marijuana plant and the guns.

Absent any direction from the police, Meisling took photographs of suspected stolen General Motors' property at various locations throughout the premises. Had Meisling not been there, Sgt. Aseltine would have photographed this property. Most if not all of the General Motors' property inside the house, garage and shed was in plain view. Based on the information known to him, Aseltine believed that this property had most likely been stolen from the General Motors Proving Ground.

On August 21, 1987, Meisling contacted the State Police and the Livingston County Assistant Prosecutor, and a warrant was obtained to search for and seize allegedly stolen General Motors' parts and equipment at the Bills' residence. The Prosecutor knew Meisling was going to accompany the State Police, but he did not indicate in any manner that it would be inappropriate. Aseltine had no involvement whatsoever in the search on August 21, 1987. Nor did he instruct Meisling to have any contact with the State Police regarding it.

Sgt. Aseltine testified that he was not aware of any state, federal or local law prohibiting a private person from being invited to accompany the police during execution of a search warrant. He had never been advised by a prosecutor or instructor that it would be unreasonable or unlawful. He believed that he acted reasonably, lawfully and in good faith when he invited Meisling to accompany him.

Dennis Payne, Ph.D., a former deputy commander of the Michigan State Police and current assistant professor at Michigan State University teaching police related subjects, was presented by the defense as an expert witness. Dr. Payne testified that there is no instruction

given at any Michigan police academy that police officers cannot invite private individuals to accompany them during execution of a search warrant. Nor is there any law in Michigan prohibiting such conduct. Dr. Payne opined that it was "very reasonable" for Sgt. Aseltine to have called Meisling and invited him along under the circumstances. Also, he opined that Sgt. Aseltine's conduct was "absolutely correct," lawful and not in violation of Bills' civil rights.

In *Bills v. Aseltine*, 958 F.2d 697 (6th Cir. 1992) (Bills I), the circuit court found that the record supported the district court's interpretation that the police officers entered the Bills' residence on the authority of the search warrant before the generator had been located. 958 F.2d at 701-702. The circuit court also said that the police officers had the implicit authority under the search warrant to conduct a protective sweep of the premises and to seize the marijuana, which was contraband discovered in plain view. 958 F.2d at 705. The court also held that since the police officers were properly on the Bills' premises, they could photograph scenes presented in plain view, and the police photographs did not constitute a seizure, 958 F.2d at 707.

Concerning the issue of whether the scope of police authority under the warrant was exceeded by Meisling's presence and participation in the search, the court in *Bills I* concluded that this was a jury question and summary judgment should not have been granted. Summary judgment on the constitutionality (federal and state) of the search of August 20, 1987 was reversed because of the issue of material fact concerning the reasonableness of the police conduct in inviting a private citizen into the dwelling of another for purposes unrelated to executing the search warrant. The Court said:

> Thus, Meisling's inspection tour and photographing of items in plaintiff's home, by itself, while perhaps constituting a trespass, does not offend the Fourth Amendment. The critical question in this case is whether the police officers engaged in any constitutionally unreasonable act in permitting or facilitating Meisling's presence in plaintiff's home.

958 F.2d at 704. Later, the Court reiterated that ". . . the principal question in this case is whether the officers exceeded the scope of their authority under the warrant in inviting Meisling to conduct an inspection of a private dwelling they controlled." 958 F.2d at 705.

After remand, the police officers filed a motion for summary judgment on the grounds of qualified immunity. The motion was granted as to individual police officers Owen, DeNoyer, Ewald, Davis, Gawron and Medbury; it was denied as to Aseltine. The district court also dismissed the pendent state claims for alleged violation of the Michigan Constitution.

The case proceeded to a jury trial involving only Sgt. Aseltine on the single claim under 42 U.S.C. §1983. On November 5, 1992, at the conclusion of six days of trial, the jury made a specific finding that it was not unreasonable for Aseltine to invite Meisling to enter the Bills' home on August 20, 1987 during the execution of a search warrant. Since there was no violation of the Fourth Amendment right to be free from unreasonable searches, a Judgment of No Cause for Action was entered in favor of Aseltine and against Bills.

This judgment was affirmed by the Sixth Circuit in *Bills v. Aseltine*, 52 F.3d 596 (6th Cir. 1995) (*Bills II*). After explaining that it had earlier remanded the case to resolve issues of material fact regarding whether Sgt. Aseltine had been "objectively reasonable" in inviting a

private security officer to accompany him on the search, the court held:

> A jury concluded that the officer had not acted unreasonably, and the district court dismissed Bill's state constitutional claims as a matter of law. Because we determine that there was no legal or trial error and hold that the jury's finding as to Sgt. Aseltine precludes liability for the other defendants, we affirm the judgment of the district court.

52 F.3d at 598.

SUMMARY OF ARGUMENT

In essence, Petitioner challenges the jury's verdict, but fails to identify any special or important reasons for granting certiorari; thus, her request should be denied (*see* Supreme Court Rule 10.1).

The decisions in *Bills I, Bills II* and *Ayeni v. Mottola*, 35 F.3d 680 (2nd Cir. 1994), are not in conflict. In *Bills I*, the case was remanded for trial on the reasonableness of the police actions in permitting or facilitating Meisling's presence in Bills' home. In *Bills II*, following trial, the jury's conclusion that the police had not acted unreasonably was affirmed. In *Ayeni*, on interlocutory appeal, it was determined that defendant's motion to dismiss on qualified immunity grounds was properly denied because the complaint alleged violations of Fourth Amendment rights.

Furthermore, Meisling's conduct as a private citizen did not rise to the level of an agent for the state; thus, Fourth Amendment protections were not applicable.

REASONS FOR DENYING THE WRIT

I.

THE DECISIONS BY THE SIXTH CIRCUIT IN *BILLS I* AND *BILLS II* AND BY THE SECOND CIRCUIT IN *AYENI* ARE NOT IN CONFLICT AND DO NOT SERVE AS A BASIS FOR FURTHER REVIEW BY THIS COURT.

Petitioner asserts that the circuit courts in *Bills* and *Ayeni* have reached contradictory results. However, a close reading of these cases dispels Petitioner's assertion. In *Bills I*, since Petitioner was seeking money damages in a 42 U.S.C. §1983 action and not suppression of evidence in a criminal action, the issue was whether Sgt. Aseltine and his fellow police officers "committed acts that resulted in a constitutionally unreasonable intrusion into plaintiff's residence." 958 F.2d at 703. Meisling's inspection and photographing of items in Petitioner's home did not offend the Fourth Amendment, in part, because he was not acting under color of state authority, but rather, as a private citizen. The circuit court recognized that the manner in which a search warrant is executed presented a jury question in a §1983 action. Accordingly, the circuit court reversed the district court's summary judgment and remanded the matter for trial on the issue of the reasonableness of the police actions.

On remand, the jury concluded that Sgt. Aseltine did not act unreasonably in inviting Meisling to accompany him to Petitioner's home. On appeal to the Sixth Circuit, the court in *Bills II* affirmed the judgment in favor of Aseltine that he did not act unreasonably.

In *Ayeni*, Secret Service Agent Mottola invited a CBS camera crew to accompany him in the execution of a search warrant. The purpose of having the camera crew present "was to permit public broadcast of (Ayeni's)

private premises, and thus to magnify needlessly the impairment of their right of privacy." 35 F.3d at 686. It is axiomatic that the right to privacy is a critical protection afforded by the Fourth Amendment. Given the clear purpose of Mottola's actions in having a commercial television camera crew present during the search, it is not surprising that the Second Circuit would conclude that the complaint alleges Fourth Amendment violations resulting in Mottola being denied a defense of qualified immunity, which he had claimed in a pretrial motion to dismiss.

The most significant distinguishing feature between *Bills* and *Ayeni* is the fact that *Ayeni* involved an interlocutory appeal from a district court order denying a motion to dismiss on the ground of qualified immunity. The Second Circuit affirmed, finding that "[t]he complaint sufficiently alleges Fourth Amendment violations to withstand a motion to dismiss based on qualified immunity." 35 F.3d at 691. In *Bills*, the issue is not whether the complaint was sufficient. A jury trial has occurred with a finding in favor of Sgt. Aseltine. Specifically, the jury considered all the evidence and found that Sgt. Aseltine acted reasonably in permitting Meisling to accompany him into Petitioner's home for the purpose of obtaining photographs of allegedly stolen General Motors property.

The court in *Ayeni* itself recognized that it was not making a definitive and final legal ruling applicable in all situations. In footnote number 8, relied on by Petitioner, the court said that *Bills I* "lends support to the proposition that permitting the presence of a third party not assisting in a search *may* violate the Fourth Amendment" (emphasis added). 35 F.3d at 686 n. 8. As the court acknowledged, such a violation is uncertain; it does

not necessarily occur when a third party is present. In *Bills*, after a complete trial, the jury weighed the evidence and determined that there was no constitutional violation and that, in fact, Sgt. Aseltine had not acted unreasonably in permitting Meisling's presence.

In *Bills II*, the court discussed the *Ayeni* decision as follows:

> *Ayeni* may be distinguished by the court's failure to define narrowly the right allegedly violated, instead describing the violation in abstract and general terms as a Fourth Amendment right to privacy:
>
> * * *
>
> It is hard to imagine any contested search that could not be portrayed as an invasion of privacy, and even more difficult to see how a police officer could tailor his conduct under such a vague standard. As with the example of the Due Process Clause cited in *Anderson*, 483 U.S. at 640, 107 S.Ct. at 3039, the fact that the Fourth Amendment embodies "well-established" principles will not defeat a claim of qualified immunity. Otherwise, the doctrine is rendered a mere rule of pleading.
>
> The Second Circuit cited *Bills I* for the proposition "that permitting the presence of a third party not assisting in a search *may* violate the Fourth Amendment." *Ayeni*, 35 F.3d at 686 n. 8 (emphasis added). The word "may" is of great significance; the Sixth Circuit has determined that the presence of a private citizen at the execution of a search warrant is not *per se* a constitutional violation.

52 F.3d at 602.

In *Harlow v. Fitzerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), this Court held that qualified immunity applies when a defendant's conduct

does "not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Under this standard, Mottola had to know that permitting commercial television cameras to videotape the entire search would by its very nature violate Ayeni's right to privacy. Sgt. Aseltine, on the other hand, had no knowledge of any Fourth Amendment violation by permitting a private security officer to photograph allegedly stolen items while Aseltine was executing an otherwise constitutionally valid search warrant. In *Bills II*, the court acknowledged the lack of any definitive rule of law with respect to the role of private citizens in accompanying law enforcement agents in the execution of a search warrant, citing to *United States v. Clouston*, 623 F.2d 485 (6th Cir. 1980), *Ayeni* and *Bills I*. 52 F.3d at 603.

Thus, the holdings in *Bills I, Bills II* and *Ayeni* are not in conflict and do not form a basis for this Court to assume jurisdiction for review.

As to the police officers other than Sgt. Aseltine, none of their activities violated any "clearly established" federal or state law. No statutory or constitutional right was transgressed. Furthermore, there is no Michigan statute or case law which prohibits a private citizen from accompanying law enforcement officers who are conducting a search pursuant to a warrant.

Concerning federal law, 18 U.S.C. §3105 provides that other persons may accompany an officer executing a search if that person is aiding the officer. See *United States v. Clouston, supra; United States v. Schwimmer*, 692 F. Supp. 119 (E.D. N.Y. 1988). In the instant case, the Sixth Circuit noted that *Clouston* is distinguishable. 958 F.2d at 702. However, the point remains that there is no clearly established law, which should have been known by the police, prohibiting a private individual

from accompanying police officers in the execution of a search and seizure pursuant to a duly authorized warrant.

Police officers in the position of these Respondents could have reasonably believed that their conduct regarding Meisling did not violate law that was clearly established at the time. The issue does not involve a right that has been particularized or a right with clear contours. It can hardly be said that Meisling's presence was illegal in view of existent law. Likewise, it can not be said that any illegality was "apparent" to the police.

Nonetheless, the Sixth Circuit in *Bills II* held that the question of whether the other police officers were liable became moot when the jury decided that Sgt. Aseltine had not acted unreasonably when he invited Meisling to enter the Bills' residence. The court said:

> We hold that Aseltine's culpability is necessary to any liability of the other officers. Aseltine actively *performed* (invited Meisling to the search) what they merely failed to prevent, and he actually *knew* what they might only suspect. The officers' alleged violations were, in essence, "lesser included offenses" of Aseltine's, so that the jury's finding that Aseltine acted reasonably must mean that there can be no liability for failing to prevent "reasonable" actions. Thus, we find that Bills is collaterally estopped from going to a jury on the reasonableness of the attending officers' conduct. Since the officers did not act unreasonably, they are entitled to qualified immunity.

52 F.3d at 604; emphasis in original.

II.

A PRIVATE SECURITY OFFICER'S CONDUCT IN BEING PRESENT ON THE PREMISES DURING A SEARCH BY STATE LAW ENFORCEMENT OFFICERS IS NOT SUBJECT TO FOURTH AMENDMENT PROTECTION.

The remainder of Petitioner's argument is meritless, because it is based on the incorrect conclusion that Meisling's conduct may be considered state action for Fourth Amendment purposes.

A search by a private citizen, without more, is not subject to the restraints of the Fourth Amendment. *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 65 L.Ed. 1048 (1921).

Furthermore, although *Soldal v. Cook County*, ___ U.S. ___, 113 S.Ct. 538, 121 L.Ed.2d 450 (1992), holds that actions of private citizens when supported by police activity are subject to Fourth Amendment protections, this legal principle is inapplicable under the facts of the instant case. In *Soldal*, the landlord had initiated eviction proceedings. He requested the sheriff's presence to prevent any interference by the tenants in their actual physical eviction. The deputy sheriffs knew there was no eviction order and that the landlord's actions were illegal, but they allowed the eviction to take place. Sgt. Aseltine's conduct is factually distinguishable from that of these deputy sheriffs. He had a valid search warrant and had no knowledge of any illegal conduct. He did nothing to support Meisling in the taking of photographs. Also, Petitioner was not home when Meisling was taking pictures, so there was no restraint of her from interfering with Meisling's activities.

The Sixth Circuit twice made findings that completely undermine Petitioner's argument. First, in *Bills I*, the court concluded that "Meisling was acting for his own

purposes rather than any purpose of the officers in the execution of their warrant." 958 F.2d at 702. Second, in *Bills II*, the court determined that "Meisling is not a state actor and thus cannot violate the Fourth Amendment." 52 F.3d at 606.

Since the facts dispel any argument that Meisling acted as a "instrument or agent" of the state, *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, 109 S.Ct. 1402, 1411 (1989), Meisling's actions cannot implicate the protections of the Fourth Amendment. Therefore, no separate warrant was needed by Sgt. Aseltine for Meisling's activities. Additionally, if a warrant for Meisling's activities was unnecessary, Sgt. Aseltine cannot be deemed to have knowingly violated a clear constitutional right.

CONCLUSION

Petitioner has failed to set forth any important or compelling reasons as to why certiorari should be granted. The lower court has disposed of Petitioner's appeal in accordance with well established precedent. Therefore, this Petition for Certiorari should be denied.

Respectfully submitted,

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